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Child Custody Jurisdiction and Territoriality

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With the adoption of the Uniform Child Custody Jurisdiction Act (UCCJA) in every state of the United States[1] and the enactment of the Parental Kidnapping Prevention Act of 1980 (PKPA),[2] the widespread hope was that jurisdictional confusion in child custody litigation would disappear.[3] To a great extent, that hope has been realized. The rampant jurisdictional competition common among state courts before the UCCJA and the PKPA no longer seems to occur.[4] In a deliberate restriction and recasting of prevailing common-law notions of child custody jurisdiction,[5] both statutes carefully prescribe "jurisdiction" to render an initial custody decree and to modify a preexisting decree,[6] and both statutes impose on state courts the obligation to recognize and enforce

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1. UNIF. CHILD CUSTODY JURIS. ACT 9 U.L.A. 115 (1988) (Table of Jurisdictions Wherein Act Has Been Adopted).

2. Pub. L. No. 96-611, 94 Stat. 3569 (1980) (codified in pertinent part at 28 U.S.C. § 1738A (1982)).

3. Commentators have maintained that the UCCJA itself stabilized the often tumultuous world of child custody litigation. *See, e.g.*, S. KATZ, CHILD SNATCHING: THE LEGAL RESPONSE TO THE ABDUCTION OF CHILDREN 30-31 (1981) (noting "beneficial effect" of UCCJA); Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody and Excessive Modification*, 65 CALIF. L. REV. 978, 1014 (1977) [hereinafter *Progress Under the UCCJA*]; Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the UCCJA*, 14 FAM. L.Q. 203, 226-27 (1981) [hereinafter *Interstate Custody*]. Supporters of the PKPA claimed that the added force of federal law regulating custody jurisdiction would fill the gaps left by recalcitrant state legislatures who had not yet adopted the UCCJA or had adopted it with significant variations from the uniform version. *See Parental Kidnapping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Dev. of the Senate Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. Addendum 139-40 (1980) [hereinafter *Joint Hearing*].

4. One cannot deny that the jurisdictional landscape is much more ordered today than in pre-UCCJA times. For a discussion of the common-law approach to child custody jurisdiction, see *infra* notes 40-54 and accompanying text. Moreover, the existence of a federal command for recognition of out-of-state custody decrees, even if unenforceable through the federal courts after Thompson v. Thompson, 484 U.S. 174 (1988), surely reduces the readiness of state courts to disregard a sister state's decree. Observers have tended to be optimistic about the impact of the two acts, in particular the federal act. Although empirical data is lacking, some commentators maintain that comparatively few cases have been reported after 1980 in which state courts have refused to recognize an out-of-state custody decree. *See* S. KATZ, *supra* note 3, at 31; Bodenheimer, *Interstate Custody*, *supra* note 3, at 226. Nevertheless, the justification for the optimism has been questioned. *See, e.g.*, Blakesley, *Child Custody—Jurisdiction and Procedure*, 35 EMORY L.J. 291, 362-64 (1986).

5. *See infra* notes 42-60 and accompanying text.

6. *See* UNIF. CHILD CUSTODY JURIS. ACT § 3, 9 U.L.A. 143-44 (1988); 28 U.S.C. § 1738A(c)(2) (1988). Although the jurisdictional guidelines vary to some extent, each act contemplates the exercise of jurisdiction by a state that has the requisite ties with the child or with the child and one contestant. *See infra* notes 150-54 and accompanying text for a discussion of the ways in which the PKPA diverges from the UCCJA.

custody decrees of sister states that have been rendered in accordance with the statutory guidelines.[7]

Nevertheless, ambiguities persist.[8] One question, the focus of this Article, is whether "personal jurisdiction" over the absent parent is a constitutional requirement in child custody litigation. The Supreme Court has not definitively resolved the issue, although it has offered occasional mystifications. In the ambiguous decision *May v. Anderson*,[9] the Court held that a child custody decree from one state was not entitled to recognition in a second state when the rendering court lacked personal jurisdiction over the absent parent. The decision was met with sharp criticism, both on and off the bench.[10] Justice Frankfurter's concurrence, urging a flexible full faith and credit interpretation, seemed to win the support of the lower courts and was ultimately followed by the drafters of the UCCJA.[11] Under the clear guidelines of the UCCJA, personal jurisdiction over an absent parent is not a prerequisite to the exercise of child custody jurisdiction, and the PKPA similarly does not establish personal jurisdiction over an absent parent as a prerequisite to interstate recognition of custody decrees.[12]

Following the lead of the UCCJA, many state courts have held that personal jurisdiction over the absent parent is not a constitutional requirement for custody jurisdiction.[13] On the other hand, several courts recently have an-

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7. The UCCJA has three key provisions that discourage relitigation of custody decrees. *See* UNIF. CHILD CUSTODY JURIS. ACT § 13, 9 U.L.A. 276 (1988) (requiring recognition of out-of-state custody decrees entered in accordance with Act); UNIF. CHILD CUSTODY JURIS. ACT § 14, 9 U.L.A. 292 (1988) (limiting authority of court to modify custody decree of another state); UNIF. CHILD CUSTODY JURIS. ACT § 15 9 U.L.A. 311 (1988) (facilitating filing and enforcement of custody decree of another state). The PKPA, likewise, requires recognition of out-of-state decrees entered consistently with the terms of the Act, 28 U.S.C. § 1738A(a), and limits the modification authority of a state once a sister state has entered a decree, 28 U.S.C. § 1738A(f).

8. The ambiguities are amply explored in the literature, and the following is only a representative sample. *See, e.g.*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 463-94 (2d ed. 1988) (examining interpretational issues in each act and exploring the material inconsistencies between the PKPA and the UCCJA); Bodenheimer, *Progress under the UCCJA*, *supra* note 3; Ratner, *Procedural Due Process and Jurisdiction to Adjudicate: (a) Effective-Litigation Values vs. The Territorial Imperative (b) The Uniform Child Custody Jurisdiction Act*, 75 NW. U. L. REV. 363, 390-410 (1980) (discussing weaknesses in jurisdictional guidelines of UCCJA); Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297 (1981) (analyzing conflicts between the PKPA and the UCCJA); Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982) (exploring constitutional and statutory issues under UCCJA and PKPA). Professor Coombs, as a Senate staff member, was a principal draftsman of the PKPA. *Id.* at 713-14 n.4.

9. 345 U.S. 528 (1953).

10. *See, e.g.*, *id.* at 539 (Jackson, J., dissenting) ("A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system."); Hazard, May v. Anderson: *Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959).

11. UNIF. CHILD CUSTODY JURIS. ACT § 12 comment, 9 U.L.A. 274-75 (1988) ("The section is not at variance with May v. Anderson . . . which relates to interstate recognition rather than in-state validity of custody decrees."); UNIF. CHILD CUSTODY JURIS. ACT § 13 comment, 9 U.L.A. 277 (1988) ("This is in accord with a common interpretation of the inconclusive decision in May v. Anderson . . . ."). Frankfurter's interpretation was endorsed, as well, by the American Law Institute. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 comment c (1971).

12. UNIF. CHILD CUSTODY JURIS. ACT §§ 3, 12 comment, 9 U.L.A. 143-45, 274-75 (1988); 28 U.S.C. § 1738A(c).

13. *See, e.g.*, Goldfarb v. Goldfarb, 246 Ga. 24, 268 S.E.2d 648 (1980); *In re* Marriage of Leonard, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981); *In re* Marriage of Hudson, 434 N.E.2d 107 (Ind. Ct. App. 1982), *cert. denied*, 459 U.S. 1202 (1983). The *Hudson* decision was criticized in Garfield, *Due Process Rights of Absent Parents in Interstate Custody Conflicts: A Commentary on* In re Marriage of Hudson, 16 IND. L. REV. 445 (1983). *See generally* H. CLARK, *supra* note 8, at 462-63.

nounced that personal jurisdiction is a constitutional prerequisite for a valid custody decree and have refused recognition of out-of-state decrees where the absent contestant lacked minimum contacts with the rendering forum.[14] Commentators are divided in their assessment of this problem, ranging from Professor Leonard Ratner's remarkable rethinking of personal jurisdiction law and its application to the child custody domain[15] to the late Professor Bodenheimer's insistence on retaining the "status" exception to personal jurisdiction.[16]

In the recent decision in *Burnham v. Superior Court*,[17] Justice Scalia, writing for a plurality, may have unwittingly breathed new life into the jurisdictional implications of *May*. *Burnham* raised the question whether a state could constitutionally assert jurisdiction in a divorce action over a nonresident who was personally served with process while temporarily in the state, for reasons unrelated to the divorce suit.[18] Although the divorce action sought a division of marital property, child support, and a determination of child custody, the nonresident father's jurisdictional challenge was directed only to the property and support claims.[19] Relying largely on the weight of tradition, the plurality upheld the continuing validity of personal jurisdiction based on in-state service and expressly avoided reliance on the "minimum contacts" doctrine.[20] Justice Brennan, writing for another plurality, concurred in the judgment after engaging in an "independent inquiry into the . . . fairness of the prevailing in-state service rule."[21] Although endorsing different rationales, the justices were unanimous in the holding that jurisdiction based on in-state service comported with the due process clause. That holding freed California to decide the property and support claims at issue in the case.

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14. *See, e.g., Ex parte* Dean, 447 So. 2d 733 (Ala. 1984); Pasqualone v. Pasqualone, 63 Ohio St. 2d 96, 406 N.E.2d 1121 (1980); DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989).

15. *See* Ratner, *supra* note 8 (urging that UCCJA be amended to protect, in part, effective litigation values at core of personal jurisdiction theory); *see also* Lewis, *A Brave New World for Personal Jurisdiction: Flexible Tests Under Uniform Standards*, 37 VAND. L. REV. 1, 54-59 (1984) (arguing that due process protects reasonable expectations and that absent parents should anticipate litigation in state having best access to information relevant to custody question); Garfield, *supra* note 13, at 452-59 (urging flexible application of minimum contacts doctrine in child custody arena).

16. *See* Bodenheimer & Neely-Kvarme, *Jurisdiction Over Child Custody and Adoption After* Shaffer *and* Kulko, 12 U.C. DAVIS L. REV. 229, 239-41 (1979). Writers have disagreed as well about the proper boundaries of the status exception to personal jurisdiction. *See, e.g.*, Blakesley, *supra* note 4, at 339-49 (distinguishing divorce from custody).

17. 110 S. Ct. 2105 (1990).

18. *Id.* at 2109.

19. Petitioner Dennis Burnham conceded in his Petition for Certiorari that a state may dissolve a marriage and decide child custody "without personal jurisdiction." *See* Petition for Certiorari at 13, Burnham v. California Superior Court (No. 89-44), (July 12, 1989) (*cert. granted in* 110 S. Ct. 47 (1989)). Petitioner explained that "[a] state can . . . adjudicate issues regarding child custody and visitation, if the conditions of the Uniform Child Custody Jurisdiction Act are met because this is a question of subject matter jurisdiction and again only involves status." *Id.*

20. Justice Scalia wrote, "[t]he short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' " *Burnham*, 110 S. Ct. at 2115. By relying on tradition, Scalia avoided an inquiry into the subjective fairness of transient jurisdiction.

21. *Burnham*, 110 S. Ct. at 2120 (Brennan, J., concurring). Concurring separately, Justice White relied on the widespread acceptance of transient jurisdiction. *Id.* at 2119-20. In addition, Justice Stevens, in his concurring opinion, relied on a combination of "the historical evidence and consensus identified by Justice Scalia, considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White." *Id.* at 2126.

Nevertheless, Justice Scalia, writing at this point only for himself and two other justices, apparently assumed that jurisdiction to determine child custody, as well as property and support claims, was at stake.[22] Preferring the more objective standard of in-state service, Justice Scalia rejected the suggestion that the father's three-day stay in California could support personal jurisdiction on a minimum contacts analysis. He explained, "[t]hree days' worth of . . . benefits strike us as powerfully inadequate to establish, as an abstract matter, that it is 'fair' for California to decree the ownership of all Mr. Burnham's worldly goods acquired during the ten years of his marriage, *and the custody over his children.*"[23]

Justice Scalia, under the misperception that the petitioner was challenging California's authority to determine the custody of his children, clearly assumed that personal jurisdiction over the husband was a prerequisite to, and a sufficient basis for, custody jurisdiction. That assumption, however, is contrary to prevailing notions of custody jurisdiction. In the passage referred to above, Justice Scalia equated jurisdiction to determine property claims with jurisdiction to determine custody. He focused on the father's contacts with the forum and ignored the fact that the children had been living for more than a year in California with their mother. By disregarding the children's residence in California, the Justice overlooked a circumstance that would have been of critical importance under the UCCJA and the PKPA in establishing judicial competence. His implicit approach, applying ordinary concepts of personal jurisdiction in an undifferentiated way to custody, support, and property claims, would significantly undercut the state and federal acts. Of great moment to children and their families, his approach would leave the states with decidedly less power to render final and enforceable custody decrees.

In this Article, I first examine the dichotomous terminology of "in personam" or "personal" jurisdiction, on the one hand, and "subject matter" jurisdiction, on the other, and the problems raised by the use of these formalistic labels in the child custody context. I then explore the common-law formulations of child custody jurisdiction, including the "status exception" to personal jurisdiction. The relevant Supreme Court pronouncements on custody jurisdiction are analyzed, with particular emphasis on *May v. Anderson.* The jurisdictional premises of the UCCJA and the PKPA, representing the widely-accepted contemporary statutory solutions to the problem, are briefly described. Finally, drawing on themes from the jurisprudence of state court jurisdiction, including the various *Burnham* opinions, I offer an analytic framework that diverges in some important respects from the current treatment of jurisdiction to determine custody, but nevertheless validates the basic structure of the UCCJA and the PKPA.

In the suggested framework, I posit that a court needs "territorial jurisdiction" over the child custody dispute, rather than personal jurisdiction over the absent contestant, in order to render a valid and enforceable decree. I argue

22. Chief Justice Rehnquist and Justice Kennedy joined Justice Scalia in this part of the opinion. *See Burnham,* 110 S. Ct. at 2109.

23. *Burnham,* 110 S. Ct. at 2117 (emphasis added).

that the needed judicial power arises from child-centered contacts with the forum state and that the jurisdictional standards of the UCCJA and the PKPA provide more protection for the absent custody contestant than the constitutional minimum. Under Justice Scalia's approach in *Burnham*, such a jurisdictional theory, founded on tradition and reflected in current practice, affords the absent parent all the process that is due under the fourteenth amendment. Moreover, Justice Scalia's familiar deference to state authority takes on importance in the context of child custody jurisdiction. The unique legislative consensus at the state and federal levels has created a workable, if flawed, system of interstate custody adjudication. A return to constitutional indeterminacy in this area would be particularly unfortunate.[24] At the same time, the theory of territorial jurisdiction advanced in this Article reasonably accommodates the needs of children, litigants, and judges "in the trenches" of custody warfare. As such, the theory should satisfy the fairness standard articulated by other members of the *Burnham* Court.

I. GETTING INTO THE PROBLEM

A. *The Words*

First-year law students learn that legal terms carry multiple meanings, but the chameleon term "jurisdiction" probably confounds more students than does any other word. Students must accept that the word may refer to, among other things, geographic territory, a sovereign's reach, legislative authority, executive authority, judicial power over parties, and judicial power over categories of cases. Professors drill into students that some kinds of jurisdiction may be waived and some may not, that some kinds of jurisdictional defects may be raised in a collateral attack and some may not, that some jurisdictional requirements are constitutionally based and some are not. As in other areas of the law, the terminology takes on a life of its own, and soon the repetition of the terms is considered an explanation.

Judicial competence, according to our legal tradition, depends on the existence of, first, subject matter jurisdiction and, second, personal jurisdiction, jurisdiction in rem, or some other form of "territorial" jurisdiction.[25] By bifur-

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24. For other critiques of indeterminacy in the field of personal jurisdiction, see Posnak, *The Court Doesn't Know Its* Asahi *from Its* Wortman*: A Critical View of the Constitutional Constraints on Jurisdiction and Choice of Law*, 41 SYRACUSE L. REV. 875 (1990) (urging a more certain and simple test for personal jurisdiction because of the preliminary nature of the issue); Louis, *The Grasp of Long Arm Jurisdiction Finally Exceeds Its Reach: A Comment on* Word-Wide Volkswagen Corp. v. Woodson *and* Rush v. Savchuk, 58 N.C. L. REV. 407 (1980) (urging a more certain test for personal jurisdiction in order to facilitate the task of decisionmaking for the Supreme Court).

25. *See, e.g.*, Pennoyer v. Neff, 95 U.S. 714 (1877). Writing for the majority in *Pennoyer*, Justice Field stated:

> To give [judicial] proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance. *Id.* at 733.

The American Law Institute has devised this formulation:

> A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action . . . and

cating the question in that manner, a court ensures that it has authority to hear the category of controversy before it, as well as the necessary authority within a system of coordinate sovereigns, based on territorial connections, to enforce a decree against a particular defendant or piece of property.[26] Many courts sitting in child custody cases, however, have opined that only subject matter jurisdiction is necessary, notwithstanding the fact that such courts must ensure compliance with their decrees and do so ordinarily through their contempt powers.[27]

One court, for example, explained that judicial power to adjudicate custody existed under the UCCJA "without acquiring personal jurisdiction over an absent party. Once the subject matter jurisdiction of the . . . court has been established, the resulting custody decree is binding if the absent party has been given notice and opportunity to be heard as provided by [the UCCJA]."[28] Other courts have similarly reasoned that the UCCJA's guarantees of notice and opportunity to be heard, along with the statute's provisions for forum non conveniens dismissals,[29] protect the "due process" rights of an absent parent, once subject matter jurisdiction has been established.[30]

As a result of the frequent characterization of judicial authority in custody cases as subject matter jurisdiction, certain essential qualities of subject matter jurisdiction inevitably come into play. Thus caught in their own definitional snare, courts have ruled that jurisdiction in child custody disputes cannot be consensually bestowed upon a court by the appearance of two willing parents.[31] We are told that because the UCCJA concerns subject matter jurisdiction, not

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(1) The party against whom judgment is to be rendered has submitted to the jurisdiction of the court, or

(2) Adequate notice has been afforded the party . . . and the court has territorial jurisdiction of the action.

RESTATEMENT (SECOND) OF JUDGMENTS § 1 (1982). I prefer the term "territorial jurisdiction" to other phrases sometimes used ("adjudicative jurisdiction," or "judicial jurisdiction," for example) because of its acknowledgement of a geographical limitation on the reach of state court authority.

26. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 4.1, at 90-91 (1986).

27. *See, e.g.*, Boisvert v. Boisvert, 143 Vt. 445, 466 A.2d 1184 (1983); Mace v. Mace, 215 Neb. 640, 341 N.W.2d 307 (1983); Loper v. Superior Court, 126 Ariz. 14, 612 P.2d 65 (1980). Professor Ratner observed that Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948), was the first child custody case in which the court confused the concepts of personal jurisdiction and subject matter jurisdiction. *See* Ratner, *supra* note 8, at 408-10. At least one state court, however, used the subject matter characterization before *Sampsell*. *See* Dorman v. Friendly, 146 Fla. 732, 1 So. 2d 734, 736 (1941) ("The subject matter involved in the question of custody of minor children is the children themselves, and if the court has not jurisdiction of the children it has not jurisdiction of the subject matter . . . .").

28. Martinez v. Reed, 49 So. 2d 303, 306 n.1 (La. Ct. App. 1986).

29. *See* UNIF. CHILD CUSTODY JURIS. ACT § 7, 9 U.L.A. 233-34 (1988).

30. *See, e.g.*, *In re* Marriage of Leonard, 122 Cal. App. 3d 443, 457-58, 175 Cal. Rptr. 903, 911 (1981) (any requirement of personal jurisdiction would "emasculate" UCCJA, and custody decree is entitled to recognition if parent has received notice and opportunity to be heard); Spaulding v. Spaulding, 460 A.2d 1360, 1364 (Me. 1983) (sister state need not recognize custody decree under UCCJA if absent parent did not have reasonable notice and opportunity to be heard).

31. *See, e.g.*, Brooks v. Brooks, 546 So. 2d 100 (Fla. Dist. Ct. App. 1989); Sholty v. Carruth, 126 Ariz. 458, 616 P.2d 918 (Ariz. Ct. App. 1980); *In re* Marriage of Olive, 340 N.W.2d 792 (Iowa Ct. App. 1983). *But see* Range v. Range, 232 Neb. 410, 411-12, 440 N.W.2d 691, 693 (1989) (mother's general appearance conferred jurisdiction on court in custody modification action). Significantly, Professor Bodenheimer argued that the Commissioners rejected consent as a jurisdictional basis under the UCCJA because they wanted to prevent forum shoppers from "luring a concerned parent into submitting to another state's jurisdiction." Bodenheimer, *Progress Under the UCCJA*, *supra* note 3, at 998-1000.

personal jurisdiction, the submission of a party to the jurisdiction of the court does not confer the necessary power upon the court.[32] Similarly, appellate courts have allowed belated challenges to trial courts' authority in custody disputes because subject matter jurisdiction can be raised at any time.[33] Finally, consistent with traditional learning, the absence of "subject matter" jurisdiction in a child custody proceeding leaves any resulting decree vulnerable to collateral attack.[34] One state court, for example, refused recognition of another state's custody decree on the ground that the foreign court lacked subject matter jurisdiction.[35] The mother's belated attack on the first court's jurisdiction was allowed, even though she had apparently willingly participated in that court's proceedings through counsel.[36]

Significantly, at least a few courts may be looking more carefully at the terminology. In one recent decision, an appellate court opined, albeit with some lack of clarity, that the jurisdictional limitations of the UCCJA are not subject matter jurisdiction but are "refinements of the ancillary capacity of a trial court to exercise authority over a particular case" and are subject to waiver.[37] Another judicial panel explained that jurisdiction under the UCCJA refers to the legislature's discretionary limit upon the exercise of existing jurisdiction and not to due process limits of subject matter or personal jurisdiction.[38] Such language reveals that the courts are struggling for the appropriate approach to, and justifications for, child custody jurisdiction.[39]

On the other hand, several recent courts have explicitly assumed that "personal jurisdiction" over the absent contestant is constitutionally necessary before a court may determine custody. In particular, the assumption has surfaced in cases not clearly governed by the UCCJA. At least two courts, for instance, have concluded that custody decrees rendered by American Indian tribal courts are invalid unless the tribe had personal jurisdiction over the opposing parent, based on the parent's contacts with the reservation.[40]

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32. Mace v. Mace, 215 Neb. 640, 640 syllabus 4, 341 N.W.2d 307, 309-10 syllabus 4 (1983).

33. *See, e.g.*, Boisvert v. Boisvert, 143 Vt. 445, 466 A.2d 1184 (1983).

34. *Id.*

35. *See* Sholty v. Carruth, 126 Ariz. 458, 616 P.2d 918 (Ariz. Ct. App. 1980).

36. *Id.* Commentators have disputed the propriety of the "subject matter" characterization found in the case law. Several have criticized reliance on the formalistic terminology. *See* Ratner, *supra* note 8, at 406-10 (arguing that UCCJA's jurisdictional provisions address personal jurisdiction rather than subject matter jurisdiction); Dorsaneo, *Due Process, Full Faith and Credit, and Family Law Litigation*, 36 Sw. L.J. 1085 (1983) (criticizing reliance on "personal jurisdiction" and "subject matter jurisdiction" terminology). Others, however, have apparently endorsed it. *See* H. CLARK, *supra* note 8, at 464-65 (seeming to endorse "subject matter" characterization); Weintraub, *Affecting the Parent-Child Relationship Without Jurisdiction Over Both Parents*, 36 Sw. L.J. 1167, 1172-74 (1983) (same); Note, Biggers v. Biggers—*The Limitation of Subject-Matter Jurisdiction under the Uniform Child Custody Jurisdiction Act*, 25 IDAHO L. REV. 427 (1988-89) (same).

37. Williams v. Williams, 555 N.E.2d 142, 145 (Ind. 1990).

38. *In re* Marriage of Slate, 181 Ill. App. 3d 110, 114, 536 N.E.2d 894, 896 (1989).

39. A similar point has been made in other contexts. *See* von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-36 (1966) (terminology of "in personam," "in rem," and "quasi in rem," obscures underlying policy issues); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 661 (1959) (criticizing jargon of in rem jurisdiction to explain power of state courts to decree *ex parte* divorces, noting that "realistic analysis is thus obscured").

40. *See* DeMent v. Oglala Sioux Tribal Court, 874 F.2d 510 (8th Cir. 1989); Application of Defender, 435 N.W.2d 717, 720-21 (S.D. 1989).

The notion that one dimension of judicial authority is necessary in child custody litigation but not the other makes little sense. Nevertheless, because "personal jurisdiction" has come to mean the power of a court to impose monetary liability on a defendant, its application to the child custody context is problematic. As explained in Part III of this Article, the tripolar nature of the child custody dispute distinguishes it from the ordinary bipolar civil action; jurisdictional doctrines developed for the latter are not necessarily appropriate for the former. The existence of some form of territorial jurisdiction, however, is an inherent requirement for any civil court within our multisovereigned system. Absent consent of the parties, courts have always required some territorial connection between the dispute and the forum state before a court of that state can assert authority over the litigants. If a court proceeds in the absence of territorial jurisdiction, the court, by definition, lacks authority to compel compliance with its orders.

The child custody court's power to render a binding custody decree may be best described as a function of two components of judicial authority: subject matter jurisdiction and territorial jurisdiction. Territorial jurisdiction in this context is a conclusory term indicating that there are sufficient geographic connections between the dispute and the forum to support the forum court's power.[41] The remainder of this Article addresses the nature of the required geographic connections in the constitutional calculus.

B. *Common-Law Formulations*

1. *Factual Requirements for Jurisdiction*

Traditionally, the child's domicile was the basis for child custody jurisdiction, domicile being deemed a connection sufficient to give rise to the power to adjust the child's relations with others.[42] The child's domicile at common law followed that of the father,[43] but the first *Restatement of Conflict of Laws* took the position that the child's domicile should follow the custodial parent where the parents were living apart,[44] and support for that rule is found even in early cases.[45] Under the domicile rule, a child's temporary presence in a state was not

41. *See* F. JAMES & G. HAZARD, CIVIL PROCEDURE 86 (1985) ("[T]he concepts of *in personam* and *in rem* jurisdiction are simply instruments for defining what should be the proper limits of state court jurisdiction, and, because they can be so easily manipulated, question-begging instruments at that.").

42. *See* Dorman v. Friendly, 146 Fla. 732, 736, 1 So. 2d 734, 736 (1941); Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542 (1907); RESTATEMENT OF CONFLICT OF LAWS § 117 (1934); Goodrich, *Custody of Children in Divorce Suits: The Conflict of Laws Problem*, 7 CORNELL L.Q. 1, 5 (1921); 2 J. BEALE, CONFLICT OF LAWS § 144.3 (1935). Some early treatises announced the rule that a court with jurisdiction to grant divorce also had jurisdiction to award child custody, but such statements seem intended to assure the bare existence of judicial power to issue custody decrees. *See* 2 J. BISHOP, NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION §§ 1179-90 at 460-63 (1891).

43. *See, e.g.*, Yarborough v. Yarborough, 290 U.S. 202 (1933); Johnson v. Taylor, 140 Ark. 100, 215 S.W. 162 (1919) (children lived with mother at all times, but their domicile was deemed that of estranged father); Beale, *Domicil of an Infant*, 8 CORNELL L.Q. 103, 104 (1923).

44. RESTATEMENT OF CONFLICT OF LAWS § 32 (1934).

45. *See, e.g.*, *In re* Thorn, 240 N.Y. 444, 148 N.E. 630 (1925). The Restatement view today is that a child's domicile is that of the parent with whom he or she lives, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 22

a sufficient basis for jurisdiction to determine custody.[46] As one court explained, only a court of the state where the child is domiciled can determine custody since the custody proceeding is in the nature of an action in rem.[47] Moreover, the majority rule seems to have been that a court, having once decreed custody on the basis of the child's domicile, would lose jurisdiction to modify the decree if the child and custodial parent later relocated to another state.[48]

The common law's exclusive focus on domicile provoked criticism that the domicile requirement was formalistic and that it often ignored the child's actual location.[49] Some critics reasoned that the child should be physically present within the jurisdiction of the court in order for the court to be able to make a considered determination of the child's best interests.[50] Even during the heyday of the domicile rule, courts occasionally voiced support for the assumption of jurisdiction based on the child's presence—especially in cases of emergency—or actual residence, rather than solely on the child's technical domicile.[51]

In addition, a few early courts intimated that personal jurisdiction over both parents was a necessary element of competence to determine custody, but the cases seem to be influenced by other factors.[52] In particular, the cases indicate that if the child and the defending parent were both outside the forum state, or if the child's presence in the forum had been obtained surreptitiously, the court would lack authority to determine the child's custody.[53] Moreover, a few commentators took the position that a binding custody decree could not be

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(1971), but the father's domicile may still carry weight where the child lives with neither the mother nor the father. *See id.* at comment (d).

46. Lanning v. Gregory, 100 Tex. 310, 99 S.W. 542 (1907) (child's temporary presence in Texas did not bestow jurisdiction on Texas courts to determine custody, where child was living with father in Louisiana and was deemed to have father's Louisiana domicile).

47. State *ex rel.* Larson v. Larson, 190 Minn. 489, 252 N.W. 329 (1934).

48. *See, e.g.*, Milner v. Gatlin, 139 Ga. 109, 76 S.E. 860 (1912); Kruse v. Kruse, 150 Kan. 946, 96 P.2d 849 (1939); Beale, *The Progress of the Law 1910-1920*, 34 HARV. L. REV. 50, 58-59 (1920).

49. *See* Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42 (1940) (urging courts to avoid technical concept of domicile). One commentator colorfully described the dilemma facing the judge in a child custody dispute:

> To a judge faced with this intensely practical situation, speculations over the niceties of domicile, of distinctions between jurisdiction *in personam* and *in rem*, and, in the latter case, whether the *res* to be dealt with is the child's status or his corporal person, must seem as irrelevant to the matter in hand as a stratospheric flight to the domestic problems of an earthworm.

Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 823 (1944).

50. See, e.g., Stumberg, *supra* note 49, at 55-56.

51. *See, e.g.*, Wear v. Wear, 130 Kan. 205, 285 P. 606 (1930); Sheehy v. Sheehy, 88 N.H. 223, 225, 186 A. 1, 3 (1936); Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925). *See generally* Rheinstein, *Jurisdiction in Matters of Child Custody: An Analysis of the* Boardman *and* White *Cases*, 26 CONN. B.J. 48, 63-64 (1952).

52. *See, e.g.*, DeKraft v. Barney, 30 F. Cas. 1069 (1862) (absent parent received no notice of divorce and custody proceeding); Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928) (child withheld from mother's custody against mother's will, and child not present in rendering jurisdiction); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929) (child in custody of nonresident defendant, outside rendering state); Carter v. Carter, 201 Ga. 850, 41 S.E.2d 532 (1947) (child's brief presence in forum state obtained surreptitiously). Professor Rheinstein took the position early on that a binding custody decree could not be entered against a parent by any court that did not have personal jurisdiction over that parent. *See* Rheinstein, *supra* note 51, at 63-65.

53. *See Weber*, 200 Ind. 448, 163 N.E. 269; *Sanders*, 223 Mo. App. 834, 14 S.W.2d 458; Boens v. Bennett, 20 Cal. App. 2d 477, 67 P.2d 715 (1937); Byers v. Superior Court, 61 Ariz. 284, 148 P.2d 999 (1944); Stansbury, *supra* note 49, at 827.

entered against a parent by any court that did not have personal jurisdiction over that parent.[54]

Thus, the common-law tradition regarding child custody jurisdiction was mixed. Many courts took the position that jurisdiction to determine custody derived from the child's contacts with the forum state, whether framed in terms of domicile, residence, or presence. Where such connections were missing, or were obtained fraudulently, the amenability of the absent contestant to personal jurisdiction became pivotal.

Courts began articulating alternative bases of jurisdiction in the mid-twentieth century. In *Sampsell v. Superior Court*,[55] then-Associate Justice Traynor canvassed the common-law approaches and concluded that three theories of jurisdiction over child custody existed: in personam jurisdiction over the child's parents; jurisdiction over "status," based on the child's domicile; and jurisdiction based on the child's presence.[56] Instead of designating any single theory as the exclusive jurisdictional test, Traynor endorsed the three theories as alternative bases of jurisdiction:

> [T]here is no reason to attempt to arrive at some basis for jurisdiction that should be accepted as final and conclusive in all states. It is a sufficient basis for jurisdiction that the state "has a substantial interest in the welfare of the child or in the preservation of the family unit of which he is a part . . . ."[57]

That judicial lenience regarding custody jurisdiction was later endorsed by the American Law Institute.[58] The flexible jurisdictional approach to child custody, when combined with the doctrine that custody decrees are modifiable, nonfinal orders and therefore not entitled to full faith and credit,[59] led to prolonged litigation in different states, inconsistent court decrees, and a troubling discontinuity for children.[60] Indeed, the law as it stood before the adoption of the UCCJA and the PKPA fairly invited kidnapping.

2. *Jurisdiction to Determine Status*

The early common-law reliance on the child's domicile for custody jurisdiction derived, in part, from the theory that the custody determination was a determination of status.[61] Many modern courts, relying on assertions in the commentary to the UCCJA,[62] have likewise embraced the status doctrine, reasoning that personal jurisdiction is unnecessary because child custody determinations

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54. *See, e.g.*, Rheinstein, *supra* note 51, at 63-65.

55. 32 Cal. 2d 763, 197 P.2d 739 (1948).

56. *Id.* at 779, 197 P.2d at 748-49.

57. *Id.* at 780, 197 P.2d at 750 (quoting Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW AND CONTEMP. PROBS. at 831).

58. *See* RESTATEMENT (SECOND) OF CONFLICTS § 79 (1971) (listing child's domicile, child's presence, and parents' amenability to personal jurisdiction as alternative bases for custody jurisdiction). The ALI recently, however, adopted a jurisdictional provision paralleling the structure of the PKPA. *See id.* (Revisions 1989).

59. *See, e.g.*, New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1947), also discussed *infra* in note 131 and accompanying text.

60. *See* S. KATZ, *supra* note 3, at 11-15; H. CLARK, *supra* note 8, at 457-59.

61. *See* RESTATEMENT OF CONFLICT OF LAWS § 117 (1934); Goodrich, *supra* note 42, at 2.

62. *See* UNIF. CHILD CUSTODY JURIS. ACT § 12 comment, 9 U.L.A. 274 (1988) ("There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from

are determinations of a child's familial status, similar to determinations "in rem."[63] The American Law Institute recently went on record in support of the jurisdictional approach of the UCCJA and the PKPA by eliminating its earlier provision on custody jurisdiction and substituting a provision that parallels almost verbatim the language of the PKPA.[64] Significantly, the provision appears under the general heading "Jurisdiction Over Status."[65]

Clearly, the status theory has attracted many adherents. By definition, it has provided an escape from the troublesome notion that the constitutional requirement for personal jurisdiction applies to child custody litigation. The applicability of the theory to child custody litigation, however, is problematic.

In *Pennoyer v. Neff*,[66] Justice Field excluded certain matters from his general construct of personal jurisdiction. His now-famous caveat was the following: "[W]e do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."[67] He went on to explain that a person domiciled in a state could seek a divorce from an absent spouse, even without personal jurisdiction over that spouse, because of the state's power to determine the civil status of its inhabitants. Field seemed concerned that a contrary construction of state power would leave the stay-at-home spouse without redress.[68]

When the Supreme Court endorsed the status exception in *Pennoyer*, there was at least some disagreement concerning the validity of the exception. The status exception to personal jurisdiction in the divorce context was a uniquely American legal issue,[69] and the origins of the exception are ambiguous. One early commentator wrote that personal jurisdiction was required in divorce proceedings as a "general matter of law."[70] In contrast, Joel Bishop, the widely respected author of several treatises on American law, concluded that a status

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support actions . . ., are proceedings in rem or proceedings affecting status."); UNIF. CHILD CUSTODY JURIS. ACT § 13 comment, 9 U.L.A. 277 ("Personal jurisdiction over the [absent parent] is not required.").

63. *See, e.g.*, Warwick v. Gluck, 12 Kan. App. 2d 563, 751 P.2d 1042 (1988); *In re* Custody of Jackson, 562 So. 2d 1271 (Miss. 1990); Hudson v. Hudson, 35 Wash. App. 822, 670 P.2d 287 (1983); Creavin v. Moloney, 773 S.W.2d 698 (Tex. Ct. App. 1989); *In re* Marriage of Hudson, 434 N.E.2d 107 (Ind. Ct. App. 1982).

64. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971) (Revisions 1989).

65. *See id.* at § 77.

66. 95 U.S. 714 (1877).

67. *Id.* at 734.

68. Given the variation from state to state of the availability of divorce, Field reasoned that a requirement of personal jurisdiction might absolutely preclude a divorce for some parties. "The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress." *Id.* at 735.

69. Because of the limitations on the authority of the ecclesiastical courts, the status exception could not have arisen in England. Ecclesiastical courts were limited to divorces *a mensa et thoro* (divorce from bed and board) and only Parliament could decree absolute divorces. 3 W. BLACKSTONE, COMMENTARIES *87-103; Maynard v. Hill, 125 U.S. 190, 206 (1888). In exercising their circumscribed powers, the ecclesiastical courts could affect only those persons actually present within the diocese. *See* Ditson v. Ditson, 4 R.I. 87, 97 (1856). As Bishop pointed out, it is doubtful that a separation from bed and board would constitute a determination of "status" as contemplated in the exception. 2 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 159 at 139 (1864).

70. J. PROFFATT, WOMAN BEFORE THE LAW 136-37 (1874).

exception existed and was supported by natural, international, and municipal law.[71] Presaging the later rationale relied on by Justice Field in *Pennoyer*, Bishop defended the status exception not only as a matter of human necessity, but also as a matter of states' rights:

> If it were not so, then both States, where the domicile of the one was in the one State and that of the other was in the other State, would be deprived of the right to determine the status of their own subjects; each must yield to foreign power in the management of its domestic concerns.[72]

Drawing on a similar theme of states' rights, some proponents of the status exception analogized it to theories supporting a state's power to affect the status of slaves. In an early state court exposition on the exception,[73] the court reasoned that the sovereign's right to alter the marital status of people within its borders was similar to its right to alter the status of a slave.[74] The state's authority, according to the court, was supported by the change in status that a slave immediately incurred upon fleeing a slave state and entering a free state. If this sovereign right to alter status is valid for the partially recognized institution of slavery, the court wrote, then it must also hold for the universally recognized institution of marriage.[75]

Significantly, by the mid-nineteenth century, many American states had statutes authorizing divorce jurisdiction if either spouse were domiciled or residing in the forum state.[76] Such jurisdiction, however, was solely for the purpose of affecting status and did not compel compliance of any sort from the defendant. As Bishop explained:

> Probably the decree is not directly binding upon the person of such subject; unless he appears and answers to the suit, or at least, has notice of it, served upon his person within the jurisdiction of the court rendering it. He is not necessarily bound by any collateral clause in it, as, that he pay alimony; and he only ceases to be a husband, because he has ceased to have a wife.[77]

Thus, at its inception, the status doctrine was narrowly designed to safeguard state authority in determining civil status. It affected status, but did not "bind" the defendant to any liability or course of conduct.

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71. J. BISHOP, *supra* note 69, § 156 at 136-37. Interestingly, the Supreme Court relied on Bishop in its explanation of the status exception. *See Pennoyer*, 95 U.S. at 735. Bishop, however, cited no case law to support his statements in the cited section of the treatise. *See* J. BISHOP, *supra* note 69, § 156 at 136-37.

72. J. BISHOP, *supra* note 69, § 156 at 136.

73. Ditson v. Ditson, 4 R.I. 87 (1856).

74. One wonders whether the court's analogy to the institution of slavery reflected the judges' views of marriage.

75. *Ditson*, 4 R.I. at 102. Similarly, Bishop quotes an early English case explaining the limitations of the status exception as it related to slave status:

> [I]n the case of slavery, if the slave be in this country, we would not suffer him to be treated as such; but if the master should be domiciled here, we could not sustain an action at the instance of the slave, who was resident in the West Indies, carried on by his mandatory, for declaring his freedom.

J. BISHOP, *supra* note 69, § 147 at 129 (quoting a case cited as Duntze v. Levett, Ferg. 68, 406, 3 Eng. Ec. 360, 508).

76. *See* R. TYLER, COMMENTARIES ON THE LAW OF INFANCY, INCLUDING GUARDIANSHIP AND CUSTODY OF INFANTS, AND THE LAW OF COVERTURE, EMBRACING DOWER MARRIAGE AND DIVORCE, AND THE STATUTORY POLICY OF THE SEVERAL STATES IN RESPECT TO HUSBAND AND WIFE 900-01 (1868).

77. J. BISHOP, *supra* note 69, § 156 at 137.

The Supreme Court has not had occasion to flesh out the contours of the status doctrine. Although the Court has long endorsed the constitutional power of state courts to grant a divorce based on the domicile of one spouse,[78] it has not extended the status theory to other circumstances. In the divorce context, the power to dissolve the status of marriage arises from the paramount interests of the state of the petitioning spouse's domicile.[79] Those interests outweigh concerns for the affected absent spouse, since no action is compelled of that person.[80] Where personal liability or loss of property is at stake, however, the Court has made clear that personal jurisdiction must exist.[81]

The status doctrine received its most recent attention in *Shaffer v. Heitner*.[82] That case purportedly held that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."[83] In a footnote, the Court excluded the status exception from the scope of its holding. Justice Marshall wrote for the majority: "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness."[84] In the same footnote, Marshall cited pages from a well-known article by then-Associate Justice Traynor of the California Supreme Court.[85] In that article, Traynor summarized the jurisdictional law of divorce and, in part, of child custody and termination of parental rights. Traynor urged an abandonment of the fictional "res" in constructing a theory of jurisdiction for familial matters; he would have preferred a more candid assessment of the parties' contacts, the interests of the concerned states, and the fairness to affected parties. Only after the pages cited by Marshall does Traynor observe that

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78. *See, e.g.*, Thompson v. Thompson, 226 U.S. 551 (1913); Williams v. North Carolina, 317 U.S. 287 (1942); Estin v. Estin, 334 U.S. 541, 546-47 (1948). At one time the Court took the position that full faith and credit was not required to be given to divorce decrees unless the rendering court had personal jurisdiction over both spouses, see Haddock v. Haddock, 201 U.S. 562 (1906), but that limitation was abandoned in *Williams*.

79. In *Estin*, for example, the Court explained:

> The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation. . . . [The risks of bigamy charges or illegitimacy] are matters of legitimate concern to the State of the domicile. They entitle the State of the domicile to bring in the absent spouse through constructive service. In no other way could the State of the domicile have and maintain effective control of the marital status of its domiciliaries.

Estin, 334 U.S. at 546-47.

80. *See* Traynor, *supra* note 39, at 661 ("[A] defendant's purposeless interest in barricading the plaintiff's avenue to freedom is overwhelmingly outweighed by the plaintiff's purposeful interest in securing freedom. . . . [T]he dubious interest of defendant's state in perpetuating a broken marriage in limbo is overwhelmingly outweighed by the forum state's major interest in the orderly resolution of a plaintiff domiciliary's marital status.").

81. Kulko v. Superior Court, 436 U.S. 84 (1978); Vanderbilt v. Vanderbilt, 354 U.S. 416, 418 (1957) ("It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant.").

82. 433 U.S. 186 (1977).

83. *Id.* at 212. The Scalia plurality in *Burnham* qualified that pronouncement considerably to apply only to suits against *absent* nonresidents. *See* Burnham v. Superior Court, 110 S. Ct. 2105, 2116 (1990).

84. *Shaffer*, 433 U.S. at 208 n.30.

85. *Id.* (citing Traynor, *Is This Conflict Really Necessary*, 37 TEX. L. REV. 657, 660-61 (1959)).

"the state where a child is present must be competent to regulate his custody whether his parent is present or not . . . ."[86]

Traynor's main point was to recommend that the old terminologies be abandoned in place of more realistic and flexible analyses. His focus on, and justification of, the *ex parte* divorce was probably the basis of the Supreme Court's citation in *Shaffer*. It seems unlikely that the Court intended, by its citation, to communicate approval of an extension of the status exception to child custody determinations.[87]

Not surprisingly, courts and commentators have disagreed as to the proper application of the status exception, some maintaining that it applies to the custody determination,[88] and others positing that it better fits the state-dominated proceedings of parental rights terminations.[89] Those theorists who have applied the status doctrine to the custody determination have reasoned that child custody litigation, like the dissolution of a marriage, is a simple determination of civil status, or a proceeding in rem.[90]

The late Professor Bodenheimer asserted that "status adjudications based on specialized jurisdictional rules meet due process requirements of fairness without the need for minimal contacts of the defendant with the forum."[91] Such an approach, however, has been justifiably criticized as simplistic, because it ignores the different human relationships, legal consequences, and governmental interests involved in child custody disputes, on the one hand, and divorce proceedings, on the other.[92]

I favor a restrictive view of the status doctrine, one which does not extend to the child custody domain. In Justice Field's original construct of territorial jurisdiction, he relied on two propositions of "public law." Those principles, purportedly rooted in European international law, were that "every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory," and that "no State can exercise direct jurisdiction and authority over persons or property without its territory."[93] The first principle, in particular,

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86. Traynor, *supra* note 39, at 662 (citing Sampsell v. Superior Court, 32 Cal. 2d 763, 197 P.2d 739 (1948) (child custody jurisdiction may rest on child's presence or domicile, as alternatives to personal jurisdiction over absent parent)).

87. *Accord* Coombs, *supra* note 8, at 743-44.

88. *See* authorities cited *supra* note 63.

89. *See, e.g.*, Stansbury, *supra* note 49, at 820. For a case extending the status exception to the context of a parental rights termination, see *In re* M.S.B., D.G.B., & K.R.B., 611 S.W.2d 704 (Tex. Civ. App. 1980).

90. *See, e.g.*, Goodrich, *supra* note 42, at 2-3 ("It would seem, though it is not an open and shut proposition, that the award of the custody of children in a divorce suit is an adjudication affecting status and so properly made only where the child is domiciled, and where, it would seem, the parent to whom the child is awarded is domiciled."); UNIF. CHILD CUSTODY JURIS. ACT § 12 comment, 9 U.L.A. 274 (1988) ("There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . , are proceedings in rem or proceedings affecting status.").

91. Bodenheimer & Neely-Kvarme, *supra* note 16, at 240. The authors also urged a broad application of the status exception to such proceedings as guardianship, termination of parental rights, and adoptions. *Id.*

92. *See* Coombs, *supra* note 8, at 742-45.

93. Pennoyer v. Neff, 95 U.S. 714, 722 (1877). Professor Hazard has convincingly shown that Field's restatement of international law, taken from W. STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834), was misconceived. *See* Hazard, *A General Theory of State Court Jurisdiction*, 1965 SUP. CT. REV. 241, 252-72. Nevertheless, Field's precepts became the law of *Pennoyer*, informing much of the reasoning in the case, and must be relied on in interpreting other pronouncements in *Pennoyer*.

gave rise to the status exception for divorce. As Justice Field explained, every state has "the power to determine for itself the civil *status* of its inhabitants."[94] The second principle, however, necessarily limited the scope of that power to affect status. Under its command, a state could not directly control persons outside the state. Thus, the two principles together suggest that Field's notion of jurisdiction to affect status did not include the power to compel conduct of persons beyond the territorial borders of the state.

The pivotal focus, in Justice Field's original conception of the status theory, seemed to be the ability of a court to adjust civil status without the necessity of another party's presence. Indeed, Justice Field was prepared to dispense with notice to the absent person: "[W]e do not mean to assert, by anything we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."[95] Although the ease with which Field would have disregarded notice is jarring to our modern notions of due process, the statement does reveal that he had in mind a legal determination that did not require cooperation from an adverse party. In the classic status case, that of divorce, a decree's enforceability against the responding party is immaterial for a simple reason: a decree that dissolves a marriage is incapable of being disobeyed. A responding party may be unhappy with the outcome, but she or he cannot "violate" the granting of a divorce.

In the child custody context, by contrast, the decree determining custodial rights may be violated through the taking or concealment of a child; the withholding of a child; the failure to comply with visitation; or other forms of interference with, or non-performance of, custodial rights and duties. Courts have long recognized that rights established pursuant to a child custody decree are enforceable by contempt.[96] The contempt power exists to enforce personal orders (generally of an equitable nature), and the court's authority depends, in part, on authority over the person.[97] Thus, where a court seeks to issue binding personal orders, and to enforce those orders by contempt, the court must have a basis for asserting power over the individual who is the subject of the order. In this sense, the child custody decree, with its typical array of orders to the parties, is unlike the divorce decree, in which the dissolution of the marriage takes place at the moment the decree is rendered.[98]

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94. *Pennoyer*, 95 U.S. at 722.

95. *Id.* at 734.

96. *See* H. CLARK, *supra* note 8, at 848-49. As Professor Clark points out, courts invoke civil contempt powers as a device for coercing compliance with a custody order, and they can invoke criminal contempt powers to punish past violations of an order. *See also* Hicks v. Feiock, 485 U.S. 624 (1988).

97. *See, e.g.*, D. DOBBS, REMEDIES 87 (1973) ("In addition to having jurisdiction over the class of case involved, the court must obtain jurisdiction over the person of the defendant (or his property) if it is to render a valid decree.").

98. The divorce decree, of course, is rarely unaccompanied by other incidental orders affecting property and support rights. Long-standing jurisdictional doctrine, however, holds that the divorce court must have a basis other than the claimant's domicile to impose personal liability on the defending party. *See* H. CLARK, *supra* note 8, at 451.

To the extent the status doctrine makes sense, it should apply only to controversies in which the civil status of one or more of the parties is the sole issue and in which that status can be decreed without regard to the post-decree conduct of the parties. In such cases, the domicile in the forum state of at least one of the persons whose status is being affected would seem sufficient, under the traditional theory of the status exception, to justify the court's power.

In contrast to the court's role in a simple divorce action, the child custody court needs territorial jurisdiction to support the assertion of power over each contestant, since the resulting decree in such a dispute will compel the parties to act in a particular way. In such a context, literal use of the status exception seems misplaced. The exception connotes that authority over the opposing party is irrelevant and invites exclusive reliance on the technical concept of the child's domicile.

A better theoretical approach would be to recognize that some territorial affiliation between the child and the forum, or the opposing contestant and the forum, is necessary before the custody court can resolve the dispute before it. That affiliation, at a constitutional minimum, may include domicile of the child, presence of the child, or other kinds of child-centered connections, or the amenability of the opposing contestant to personal jurisdiction. Although the status theory, as applied to child custody, may also turn on a child-centered connection, the status terminology belies the forward-looking injunctive nature of the custody court's decree.

C. *Contributions from the Supreme Court*

Before the widespread adoption of the UCCJA, the Supreme Court had created a two-edged dilemma for participants in interstate child custody disputes. First, the Court's decision in *May v. Anderson* seemed to require personal jurisdiction in the rendering court before a sister state would be required to give whatever recognition was due under the full faith and credit clause. The *May* holding suggested, by implication, that enforcement in the rendering state would be a violation of due process as well. Second, apart from *May*, several Court pronouncements indicated that full faith and credit is inapplicable to the typically modifiable, non-final child custody award.[99]

1. May v. Anderson

The *May* decision, frequently ignored or rationalized into irrelevance[100] but occasionally followed,[101] warrants close attention. In *May*, the mother and father lived in Wisconsin with their three children.[102] When marital difficulties arose, the mother moved to Ohio with the children. Shortly after his wife and children left, the father filed for divorce in Wisconsin and petitioned for custody

99. *See infra* notes 126-32 and accompanying text.

100. *See* H. CLARK, *supra* note 8, at 462 nn.61-63.

101. *See, e.g., Ex parte* Dean, 447 So. 2d 733 (Ala. 1984). *See also* cases cited in H. CLARK, *supra* note 8, at 462 nn.58-59.

102. All facts are taken from the Supreme Court's statement of facts, *May*, 345 U.S. at 529-32.

of the children. The mother was served with process in Ohio, but, significantly, no long-arm statute in Wisconsin authorized such service. The mother did not appear in the Wisconsin proceeding. The Wisconsin court ultimately granted the divorce and awarded custody of the children to the father.

The enforceability of the Wisconsin decree eventually came before the Ohio courts when the mother refused to return the children after a visitation. The Ohio court ruled that it was obliged by the full faith and credit clause to accept the Wisconsin decree as binding on the mother.

In the Supreme Court, the mother fared better. Justice Burton, writing for four justices,[103] framed the issue as follows:

> [W]hether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her *in personam*. Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.[104]

Reasoning that "a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony,"[105] the Court held that the Wisconsin decree was not binding on the mother, and was not entitled to recognition in Ohio.

Justice Burton expressly rejected the argument that the children's technical domicile was in Wisconsin and that Wisconsin therefore had a sufficient basis for entering a binding custody decree. He wrote, "[w]e find it unnecessary to determine the children's legal domicile because, even if it be with their father, that does not give Wisconsin, certainly as against Ohio, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession."[106]

Burton's language, and the cases on which he relied, suggest that the children's residence or presence in Wisconsin at the time of the decree might have made a difference.[107] Although he did not develop the point, one reading of

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103. Justice Frankfurter concurred in the judgment; Justices Jackson, Reed, and Minton dissented; and Justice Clark did not participate. *See May*, 345 U.S. at 535, 536, 542. With the Court thus divided 4-1-3, Justice Burton's ambiguous "plurality" opinion has uncertain precedential weight. *See, e.g.*, Bodenheimer & Neely-Kvarme, *supra* note 16, at 248; Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 803-07 (1964).

104. *May*, 345 U.S. at 533.

105. *Id.* at 534. Justice Jackson strongly criticized the majority's reliance on jurisdictional theories relating to property rights. He argued that a court's ultimate concern with the welfare of the child distinguished the child custody dispute from the ordinary property-centered litigation. *See id.* at 540-41.

106. *Id.* at 534.

107. *See id.* at 535 n.8 (citing Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928) (divorce court could not determine custody of *children who were not within the jurisdiction of the court* where opposing parent was nonresident of forum, and had not been personally served nor entered appearance); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929) (court lacked jurisdiction to determine custody where opposing parent was nonresident and *children had never been in forum state*); Carter v. Carter, 201 Ga. 850, 41 S.E.2d 532 (1947) (custody jurisdiction did not exist where child was *surreptitiously* taken to forum state and court awarded permanent custody to father 3 days after child's arrival)). The cases cited by the Court leave open the possibility that the children's presence or domicile, unless fraudulently obtained, would support custody jurisdiction without regard to the existence of personal jurisdiction over the absent parent. Indeed, in *Weber*, the court noted that even if the original custody decree were deemed valid, the state of the child's present domicile would have the power to determine custody anew, if necessary. *Weber*, 200 Ind. at 455, 163 N.E. at 271.

May is that alternative bases for establishing territorial jurisdiction in the custody context exist. Judicial authority over the absent contestant is necessary, but that authority can arise from child-centered contacts (residence or physical presence of the child in the forum) *or* the amenability of the absent parent to personal jurisdiction in the forum.

In an obvious attempt to limit the impact of the holding, Justice Frankfurter, concurring, wrote that the Court had decided only that the full faith and credit clause did not require Ohio to accept the Wisconsin decree.[108] He observed, however, that Ohio could as a matter of local law recognize the Wisconsin ruling without offending due process.[109]

Justice Frankfurter's analysis does not withstand scrutiny. The plurality's premise in *May* was that territorial jurisdiction over the absent parent was constitutionally required as a matter of personal right, and it cited with approval the trio of state cases holding that custody orders entered in the absence of such jurisdiction were void.[110] Under Justice Burton's analysis, the Wisconsin decree was not entitled to recognition under the full faith and credit clause because the Wisconsin court lacked the requisite territorial jurisdiction over the mother. Constitutionally invalid judgments, of course, *cannot* be given recognition without violating the due process clause.[111] Thus, Frankfurter's attempt to cabin the case within the confines of full faith and credit while leaving the states room to escape the holding through comity is problematic. His theory may have been convenient, but it does not successfully avoid the apparent import of the plurality's opinion.

Justice Burton's opinion does suggest, however, that the Court was concerned, in part, with the lack of effective service of process on the mother. He noted that

> [t]he only service of process upon [the mother] consisted of the delivery to her personally, in Ohio, of a copy of the Wisconsin summons and petition. Such service is authorized by a Wisconsin statute for use in an action for a divorce but that statute makes no mention of its availability in a proceeding for the custody of children.[112]

Another possible construction of the case, then, is that Wisconsin had simply failed to enact a long-arm statute tailored for child custody litigation. Such a concern might seem trivial today, but in the era of *May*, decided only seven years after *International Shoe Co. v. Washington*,[113] the concept of extraterritorial power of state courts was still very new. Thus, if Wisconsin would have had an applicable long-arm statute in place, the Court might have decided the case differently. The plurality's concern with service of process indicates that the lack of a formal, legislatively sanctioned assertion of state power over the defendant may have been crucial.

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108. *May*, 345 U.S. at 535.

109. *Id.* at 535-36.

110. *Id.* at 535 n.8 (citing Weber v. Redding, 200 Ind. 448, 163 N.E. 269 (1928); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929); Carter v. Carter, 201 Ga. 850, 41 S.E.2d 532 (1947)).

111. Pennoyer v. Neff, 95 U.S. 714, 732-33 (1877).

112. *May*, 345 U.S. at 530-31.

113. 326 U.S. 310 (1945).

The Supreme Court has not again squarely addressed the question involved in *May*, but it has cited the case with apparent approval in dicta. In *Stanley v. Illinois*,[114] the Court cited *May* for the nonjurisdictional proposition that the right to have and raise a family is "more precious than property rights."[115] In the same case, however, the Court suggested that under certain circumstances, state court hearings on parental fitness could proceed without personal service on the absent father.[116] In particular, the Court seemed concerned with cases involving an unwed father whose identity or location is unknown.[117] The Court's cursory suggestion in *Stanley* has led some to conclude that personal jurisdiction is not required in parental fitness hearings or, by extension, in child custody litigation.[118]

Such a reading misses the mark. *Stanley*'s brief allusion to service of process was situated in a footnote explaining that the hearing required as a matter of due process would not unduly burden the state. The majority wanted to ensure that the unknown unwed father would not pose an insurmountable barrier to the state's ability to protect the child. That the Court was willing to dispense with service in instances where service is impossible does not mean that service can be dispensed with in all circumstances.[119] Indeed, *Stanley* should not be read for any jurisdictional significance, since jurisdiction was not in issue in the case.

The Supreme Court cited *May* in *Kulko v. Superior Court*[120] in a manner of ambiguous approval. In bolstering its conclusion in *Kulko* that the assertion of personal jurisdiction in the California support action over the New York father would be unfair, the Court wrote, "It is [the father] who has remained in the State of the marital domicile, whereas it is [the mother] who has moved across the continent."[121] To support this statement, the *Kulko* Court cited a footnote in *May* addressing the authority of a divorce court to determine custody when the children are not within the jurisdiction of the court, the defendant is not a resident of the forum state, and the defendant has not been personally served and has not appeared.[122] Thus, the *Kulko* majority may have believed that *May*'s basic holding rested in part on considerations of fairness to the absent parent and in part on the children's absence from the forum.

May v. Anderson had a greater impact in the years following its decision than it has today. Contemporaneous observers, writing before the widespread adoption of the UCCJA, concluded that the rule of *May* significantly exacerbated the problem of unenforceability of child custody decrees outside the ren-

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114. 405 U.S. 645 (1972).

115. *Id.* at 651.

116. *Id.* at 657 n.9.

117. *Id.* (noting with approval that state law governing procedures in juvenile cases provided for notice by publication when personal or mail service could "not be had").

118. *See, e.g.*, H. CLARK, *supra* note 8, at 462; Bodenheimer & Neely-Kvarme, *supra* note 16, at 242-43.

119. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

120. 436 U.S. 84 (1978).

121. *Id.* at 97 (citing May v. Anderson, 345 U.S. 528, 534-35 n.8 (1953)).

122. *May*, 345 U.S. at 535 n.8 (citing Weber v. Redding, 208 Ind. 448, 163 N.E. 269 (1928); Sanders v. Sanders, 223 Mo. App. 834, 14 S.W.2d 458 (1929); Carter v. Carter, 201 Ga. 850, 41 S.E.2d 532 (1947)).

dering state.[123] Professor Clark has noted that in the decades following *May*, the requirement of personal jurisdiction in custody cases was left in a "highly confused and confusing condition."[124] In today's era of the UCCJA and the PKPA, on the other hand, many (but not all) state courts have read *May* to mean very little.[125]

2. *Interstate Recognition*

The *May* holding only worsened an already unsettled world for child custody litigants. Custody orders hold a peculiar status under the full faith and credit clause[126] because they are typically subject to modification in the best interests of the child.[127] Some courts have reasoned that custody orders, necessarily subject to revision in the future on a showing of changed circumstances, are not "final" judgments entitled to recognition under the clause.[128] Courts have also explained that even if a custody order were deemed "final" under the full faith and credit clause, the clause and its implementing statute[129] require only that courts give the same recognition to an out-of-state judgment that the judgment would receive in the courts of the rendering state.[130] Thus, if a custody decree were subject to modification in the rendering court, the courts of a second state likewise would be entitled to modify the decree.[131]

The anomaly of child custody decrees under full faith and credit doctrine, when juxtaposed with *May's* apparent requirement of personal jurisdiction over the absent parent, gave rise to great instability in the world of child custody litigation. Under *May*, the decree was unenforceable if rendered without jurisdiction over the opposing contestant. Even if jurisdiction could be obtained, a parent could not rely on the finality or enforceability of a custody determination in his or her favor if the decree remained subject to modification. An obvious incentive existed for parents to disregard unfavorable decrees and to rely on self-help, the tactic that Justice Jackson, dissenting in *May*, so aptly labeled "seize-and-run."[132]

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123. *See* Hazard, *supra* note 10, at 384-85 (citing cases relying on *May*).

124. H. CLARK, *supra* note 8, at 463.

125. *See, e.g., In re* Marriage of Leonard, 122 Cal. App. 3d 443, 452, 175 Cal. Rptr. 903, 907-08 (1981). Similarly, commentators have often argued that the case should be overruled. *See* Hazard, *supra* note 10, at 406; Murchison, *Jurisdiction Over Persons, Things, Status*, 41 LA. L. REV. 1053, 1144 (1981).

126. U.S. CONST., art. IV, § 1.

127. *See generally* Thompson v. Thompson, 484 U.S. 174 (1988). The Supreme Court was expected to clarify the status of custody decrees under the full faith and credit clause when it granted certiorari in a case in 1982, but it subsequently dismissed the petition. *See* Eicke v. Eicke, 399 So. 2d 1231 (La. Ct. App. 1980), *cert. denied*, 406 So. 2d 607 (La. 1981), *cert. granted*, 456 U.S. 970 (1982), *cert. dismissed*, 459 U.S. 1139 (1983).

128. *See, e.g.*, Hooks v. Hooks, 771 F.2d 935, 948 (6th Cir. 1985); Borys v. Borys, 76 N.J. 103, 386 A.2d 366 (1978).

The Supreme Court declined to settle that question in Ford v. Ford, 371 U.S. 187, 192 (1962).

129. 28 U.S.C. § 1738 (1982).

130. The mandate of 28 U.S.C. § 1738, that "[s]uch Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such state . . . from which they are taken," seems to require this result. *See, e.g.*, Thomas v. Washington Gas Light Co., 448 U.S. 261 (1980); Morris v. Jones, 329 U.S. 545 (1947).

131. *See* New York *ex rel.* Halvey v. Halvey, 330 U.S. 610, 614-15 (1947).

132. May v. Anderson, 345 U.S. 528, 542 (1953) (Jackson, J., dissenting).

D. *The Statutory Solution*[133]

1. *The UCCJA*

Promulgated in 1968, the UCCJA grew out of the desire to bring a measure of interstate stability to custody awards.[134] The Commissioners on Uniform State Laws recognized that under the common law, several states might assert authority to determine custody, including the courts of the state where the child or the parent was domiciled, where the child was physically present, or where a divorce had been decreed.[135] State courts frequently acted in competition with one another and issued conflicting decrees.[136] The resulting instability and discontinuity for parents and children were a growing public concern, one which the Commissioners addressed, in part, through the formulation of uniform jurisdictional standards. Other key goals of the UCCJA were to mandate recognition and enforcement of out-of-state custody decrees, to limit a second court's authority to modify existing decrees, and to encourage the discretionary denial of jurisdiction where a contestant has engaged in child-snatching or other wrongful practices.[137]

Section 3 of the UCCJA sets forth alternative bases of jurisdiction in child custody litigation. The framework, in the Commissioners' words, "limits custody jurisdiction to the state where the child has his home or where there are other strong contacts with the child and his family."[138] These jurisdictional bases can be grouped roughly under the headings of "home state," "significant connection," "emergency," and "residual" jurisdiction.[139] As Section 3 makes clear,

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133. In this section I intend only to describe the jurisdictional premises of the UCCJA and the PKPA. The development of the two statutes, their interrelationship, and their shortcomings have been carefully analyzed by others. *See* S. KATZ, *supra* note 3; Coombs, *supra* note 8; Bodenheimer, *Interstate Custody*, *supra* note 3; Bodenheimer, *Progress Under the UCCJA*, *supra* note 3; Ratner, *supra* note 8.

134. UNIF. CHILD CUSTODY JURIS. ACT Prefatory Note, 9 U.L.A. 116-17 (1988).

135. *Id.* at 117; S. KATZ, *supra* note 3, at 12.

136. *See generally* Ratner, *supra* note 103.

137. *See* UNIF. CHILD CUSTODY JURIS. ACT Prefatory Note, 9 U.L.A. 117-18 (1988).

138. *Id.* at 118.

139. Section 3 provides, in pertinent part:

(a) A court of this State which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

(1) this State (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within 6 months before commencement of the proceeding . . . or

(2) it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection, training, and personal relationships; or

(3) the child is physically present in this State and (i) the child has been abandoned or (ii) it is necessary in an emergency to protect the child . . . or

(4)(i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

(b) Except under paragraphs (3) and (4) of subsection (a), physical presence in this State of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this State to make a child custody determination.

(c) Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

the Commissioners modified the various jurisdictional theories prevalent under the common law. The UCCJA avoids reliance on the technical concept of "domicile," and expressly limits the jurisdictional significance of the child's presence. Only for emergency or residual jurisdiction is the child's presence alone sufficient to confer jurisdiction, and the child's presence is not a jurisdictional prerequisite under the statute. The intended primary bases of jurisdiction are the prescribed showings for home state and significant-connection jurisdiction.[140] The intent underlying the jurisdictional framework was to place jurisdiction with the state most interested in, and most capable of determining, the child's welfare.[141]

The Act requires that notice and opportunity to be heard be provided to the responding contestant,[142] and it includes a provision for extraterritorial service of notice.[143] Through the provision of this "long-arm statute," the Commissioners provided a necessary step in establishing power over absent contestants.[144]

Significantly, the Commissioners dispensed with the requirement of personal jurisdiction over the absent parent and expressly endorsed the status exception. Section 12 of the Act provides that a custody decree rendered in accordance with the standards of Section 3 "binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard."[145] As the comment to that section makes clear, the two requirements for a binding custody order are jurisdiction under Section 3 and compliance with due process mandates, without regard to personal jurisdiction over an absent contestant: "There is no requirement for technical personal jurisdiction, on the traditional theory that custody determinations, as distinguished from support actions . . . are proceedings in rem or proceedings affecting status."[146]

UNIF. CHILD CUSTODY JURIS. ACT § 3, 9 U.L.A. 143-44 (1988).

140. *See* UNIF. CHILD CUSTODY JURIS. ACT § 3 comment, 9 U.L.A. 144 (1988).

141. The Commissioners relied heavily on Professor Ratner's influential analysis of the problem. *See* Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1217 (1969). Professor Bodenheimer, Reporter for the Act, explained that "[The] Committee was aided by Professor Leonard Ratner, who surveyed the field and pointed the way in his monumental study entitled 'Child Custody in a Federal System' and in a draft of a proposed uniform law" (referring to Ratner, *supra* note 103). In his study, Professor Ratner argued that access to relevant evidence should be a paramount factor in any jurisdictional theory. *Id.* at 809. Specifically, he urged that "[t]he court most likely to make a correct decision is the court having greatest access to the relevant evidence, and that court usually will be located in the state where the child has an established home—an established home being the last place where the child has lived with a parent for sufficient time to become integrated into the community." *Id.* at 815.

Interestingly, Professor Ratner more recently has criticized the UCCJA's adoption of the "significant connection" jurisdictional standard as being highly subjective and capable of expansive interpretation. *See* Ratner, *supra* note 8, at 391-92. He also faults the Commissioners for their failure to eliminate the problem of concurrent jurisdiction. *Id.*

142. UNIF. CHILD CUSTODY JURIS. ACT §§ 4 & 5, 9 U.L.A. 208, 212 (1988).

143. *Id.* at § 5. That section provides in pertinent part: "*Notice required for the exercise of jurisdiction over a person outside this State* shall be given in a manner reasonably calculated to give actual notice, and may be [by the various described methods]." (Emphasis added).

144. *See supra* notes 112-13 and accompanying text, discussing the significance in *May v. Anderson* of Wisconsin's failure to enact an applicable long-arm statute.

145. UNIF. CHILD CUSTODY JURIS. ACT § 12, 9 U.L.A. 274 (1988).

146. *Id.* at § 12, comment, 9 U.L.A. 274-75.

Similarly, in Section 13, the UCCJA requires recognition of custody decrees from other states when such decrees have been rendered in accordance with the Act or under factual circumstances meeting the jurisdictional standards of the Act.[147] In explaining once again that personal jurisdiction was not part of the statutory standard, the Commissioners wrote:

> Recognition is accorded to a decree which is valid and binding under section 12. This means, for example, that a court in the state where the father resides will recognize and enforce a custody decree rendered in the home state where the child lives with the mother if the father was duly notified and given enough time to appear in the proceedings. Personal jurisdiction over the father is not required.[148]

Professor Bodenheimer elaborated on the jurisdictional theory underlying the UCCJA in an article published contemporaneously with the promulgation of the Act.[149] She explained that the Commissioners adopted Justice Frankfurter's interpretation of the holding in *May v. Anderson* because any other reading would have caused insurmountable difficulties for the drafters in creating a workable interstate custody law.[150] In her view, Sections 12 and 13 of the Act can be justified on alternative grounds: first, the traditional notion that custody determinations are proceedings affecting status, or, second, "an evolving theory that minimum contacts of the state with the matter in litigation combined with fairness to the parties permit state judicial action binding on persons beyond its territorial limits."[151] As the comments to the UCCJA reveal, the status exception was the justification that the Commissioners chose to articulate.

2. *The PKPA*

In the late 1970s, many states had not yet adopted the UCCJA, and many of those that had adopted it included material variations from the uniform version.[152] As a result, many observers believed that a federal law was the only means of ensuring uniform interstate recognition of custody decrees. In enacting the PKPA, Congress relied on its authority to implement the full faith and credit clause, and the main problem Congress sought to remedy was the inapplicability of full faith and credit to custody determinations.[153] The purposes of the Act, as identified by Congress in the statute itself, include the promotion of interstate cooperation, the interstate enforcement of custody decrees, and the avoidance of interstate jurisdictional competition and conflict.[154]

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147. *Id.* at § 13, 9 U.L.A. 276.

148. *Id.* at § 13, comment, 9 U.L.A. 277.

149. *See* Bodenheimer, *supra* note 141.

150. *Id.* at 1232-33.

151. *Id.* at 1233.

152. *See* S. KATZ, *supra* note 3, at 32-33.

153. *See Joint Hearing*, *supra* note 3, at 48 (statement of Deputy Attorney General Michel), *id.*, Addendum at 138-39 (Section-by-Section Analysis by Sen. Wallop) (S. 105 requires "state courts to give full faith and credit to custody determinations rendered by sister state courts" and bill might induce all states to adopt UCCJA); *see generally* Thompson v. Thompson, 484 U.S. 174, 180-86 (1988).

154. 28 U.S.C. § 1738A (1982) (Congressional Findings and Declaration of Purpose).

The PKPA requires interstate recognition and enforcement of custody decrees that are entered in accordance with the jurisdictional standards of the Act, and those standards roughly parallel the basic jurisdictional scheme of the UCCJA. Consistent with the Commissioners' goal in the UCCJA, Congress hoped to ensure that "a determination of custody and visitation is rendered in the State which can best decide the case in the interest of the child."[155] The most important variation between the jurisdictional schemes of the two statutes concerns the availability of "significant connection" jurisdiction.[156] Under the literal terms of the UCCJA, a state may exercise significant connection jurisdiction even if a home state, as defined in the Act, exists at the same time.[157] In contrast, the PKPA authorizes "significant connection" jurisdiction only when there is no state qualifying as the child's home state.[158] That variation has provoked numerous criticisms from academic corners,[159] and has produced the undesirable result that some custody decrees may comply with the standards of the UCCJA but not with the standards of the PKPA. If, for example, State A is the child's home state, but the child and one parent have a significant connection with State B, sufficient to satisfy UCCJA Section 3(a)(2), a custody decree from State B would be entitled to recognition under the UCCJA, but recognition would not be mandated under the PKPA. Federal law, in other words, would allow State A to entertain a second custody action regarding the same child. As a practical matter, the attractiveness of a federal mandate for interstate recognition should lead most courts to attempt to comply with the PKPA at the initial stages.

The PKPA does not require personal jurisdiction over the absent parent for interstate recognition of child custody decrees. Testimony during congressional hearings on the PKPA addressed the problem posed by the personal jurisdiction doctrine, and various potential resolutions of the problem were proposed.[160] The

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155. *Id.* at § 1738A (c)(1).

156. The PKPA differs from the UCCJA in other respects that are not material to the focus of this Article. For example, the PKPA, but not the UCCJA, explicitly provides for continuing jurisdiction in a state once a custody determination has been made, so long as the state continues to have jurisdiction under its own law and remains the residence of the child or any contestant. *See id.* § 1738A(d). In contrast, the UCCJA recognizes continuing jurisdiction only indirectly, through the limitation on a court's authority to modify a custody decree from another state. *See* UNIF. CHILD CUSTODY JURIS. ACT § 14, 9 U.L.A. 292 (1988). Such variations, while creating potential problems for the courts in interpreting the two statutes, do not directly involve the question whether a valid and enforceable custody decree may be constitutionally rendered without personal jurisdiction over the absent parent.

157. *See* UNIF. CHILD CUSTODY JURIS. ACT § 3(a)(2) and comment, 9 U.L.A. 143-44 (1988). Professor Bodenheimer argued, however, that the UCCJA creates a preference for home state jurisdiction, such that significant connection jurisdiction becomes available only if there is no home state, or the ties of another state are equal to or stronger than the family's ties with the home state. Bodenheimer, *supra* note 141, at 1226. *See also* Bodenheimer, *Interstate Custody*, *supra* note 3, at 204-05 (arguing that there is exclusive continuing jurisdiction in the initial home state). However, her position is not supported by the language of Section 3.

158. *See* 28 U.S.C. § 1738A(c)(2)(B).

159. *See, e.g.*, H. CLARK, *supra* note 8, at 480-81; Foster, *supra* note 8, at 300-04.

160. *See, e.g., Joint Hearing*, *supra* note 3, at 151-52 (Statement of Professor Coombs) (urging that the contacts required under the jurisdictional guidelines of S. 105 would be sufficient to establish personal jurisdiction over an absent parent, or, alternatively, that the statute itself can withstand constitutional challenge even if enforcement of a custody decree might be prohibited on due process/personal jurisdiction grounds in individual case); *id.* Addendum at 138-40 (Section-by-Section Analysis by Sen. Wallop) (explaining that S. 105 adopts jurisdictional approach of UCCJA).

statute does not endorse any particular view, but clearly requires interstate recognition and enforcement of custody determinations that satisfy its jurisdictional guidelines, without regard to a finding of "minimum contacts" or other bases for personal jurisdiction over the absent parent.[161]

In sum, neither the UCCJA nor the PKPA uses the terminology of "personal jurisdiction," and neither statute on its face requires a finding of personal jurisdiction over the opposing contestant. Instead, the statutes define "jurisdiction" to determine custody by reference to child-centered contacts with the forum state. As courts and commentators have noted, the imposition of a "minimum contacts" standard of personal jurisdiction upon the existing statutory jurisdictional premises would severely undermine the statutes' effectiveness.[162]

II. FINDING A WAY OUT OF THE PROBLEM

A. *The Pitfalls of Existing Theories*

The dilemma posed by the jurisdictional holding in *May v. Anderson* should be clear. If contemporary concepts of personal jurisdiction apply to the child custody context, the goals and philosophy of the UCCJA and PKPA will be substantially undermined. In particular, the state with personal jurisdiction over the absent parent might have little contact with the child. A familiar scenario in the cases, for example, involves a post-separation move by one parent and child to a new state, with the other parent remaining in the first state. After the passage of six or more months, the second state would have presumptive jurisdiction as the home state under the UCCJA (assuming no wrongdoing by the parent with physical custody), and any decree it might issue would be entitled to enforcement under the PKPA. The absence of personal jurisdiction over the stay-at-home parent, however, would create a constitutional obstacle to enforcement of the decree, in the forum state or elsewhere, under Justice Burton's analysis in *May*. In today's mobile society, moreover, the "stay-at-home" parent may have moved to a third state, one with which the child has had no contact whatsoever. If that state is deemed the only state with power to determine custody, the UCCJA's attempt to place jurisdiction with the most interested state would be blocked.

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161. Professor Coombs advanced an original interpretation of the PKPA, theorizing that where the states with home state, significant connection, emergency, or continuing jurisdiction lacked minimum contacts with the absent parent, then residual jurisdiction should become available wherever minimum contacts did exist. *See Joint Hearing, supra* note 3, at 152 (Statement of Professor Coombs). He felt that such a construction "produces the commendable result that paragraph (D) [providing for residual jurisdiction] can be utilized whenever no state having adequate contacts with the respondent can satisfy any of paragraphs (A) through (C) and (E)." *Id. See also* Coombs, *supra* note 8, at 740-41 (urging a similar construction of Section 3 of the UCCJA). Coombs's construction of the PKPA, however, according to his own admission, is "less than obvious," *Joint Hearing, supra* note 3, at 152, and has not had widespread acceptance in the courts. *See, e.g., Ex Parte* Dean, 447 So. 2d 733 (Ala. 1984) (in challenge to Florida custody decree for lack of personal jurisdiction, Alabama court reasoned that neither PKPA nor UCCJA authorized Florida's assertion of in personam jurisdiction over nonresident; in absence of applicable long-arm statute, decree was unenforceable).

162. *See, e.g., In re* Marriage of Leonard, 122 Cal. App. 3d 443, 457-58, 175 Cal. Rptr. 903, 911 (1981) (requirement of personal jurisdiction would "emasculate" UCCJA); Bodenheimer & Neely-Kvarme, *supra* note 16, at 239 (application of minimum contacts doctrine would frustrate many custody disputes and leave many children homeless).

The "problem" of *May v. Anderson* was almost buried by the drafters of the UCCJA. The Commissioners' explicit reliance on the status exception to personal jurisdiction has a convenient appeal, but the status exception, upon examination, does not seem to support the judicial authority necessary for determinations of custody.[163] The status exception to personal jurisdiction is, by definition, an "exception." Apart from its questionable origins and uncertain dimensions, the exception implies that territorial jurisdiction is not required for judicial competence in the particular action. The exception makes sense where a court is truly declaring civil status, without regard to the post-decree conduct of any opposing party. In the child custody domain, however, power to bind the opposing parent is essential to the court's ability to render effective relief.

The theory, popular in the state courts, that child custody litigation requires "subject-matter jurisdiction," but not "personal jurisdiction," is likewise unconvincing.[164] The dichotomy eliminates one-half of the judicial competence equation by subsuming the territorial requirements of the UCCJA into the category of subject-matter jurisdiction. A more workable view is that a court with competence over a child custody dispute must have the power to enforce its judgment, including the power to compel compliance with its orders. The term "territorial jurisdiction" denotes that power.

Contemporary scholars who have concluded that personal jurisdiction is a constitutional requirement for child custody litigation have generally argued that a flexible theory of "mimimum contacts" should be applied.[165] Professor Russell Coombs, for example, has argued that the individual and state interests implicated in custody litigation (particularly the state's concern for the welfare of the child) support the use of less rigorous due process standards.[166] He reasons that courts should respect not only the individual and institutional interests that the Supreme Court has recognized as relevant to the personal jurisdiction equation but should also give some deference to the state and federal statutes adopted to advance those interests in the custody context. "If courts do so," he has written, "they will sustain custody jurisdiction exercised consistently with the U.C.C.J.A. and the [PKPA] in all but extreme cases in which courts adjudicate the rights of defendants lacking significant contacts with the forum without real justification."[167]

In contrast, Professor Ratner has argued that a revamped law of personal jurisdiction would be satisfied by the UCCJA's concept of the child's "established home."[168] He maintains that personal jurisdiction jurisprudence should be redrawn to avoid notions of territorial power and to focus on the values of effective litigation (*e.g.*, convenience of forum, forum's access to evidence, and reduced litigant harassment).[169] His resolution is to modify the UCCJA to ac-

163. *See supra* notes 93-98 and accompanying text.

164. *See supra* notes 25-36 and accompanying text.

165. *See, e.g.*, Coombs, *supra* note 8, at 752-64; Ratner, *supra* note 8, at 419-22; Garfield, *supra* note 13, at 476-79; Blakesley, *supra* note 4, at 346-49; Lewis, *supra* note 15, at 54-59.

166. Coombs, *supra* note 8, at 752-56.

167. *Id.* at 764.

168. Ratner, *supra* note 8, at 419-22.

169. *Id.* at 414, 420.

commodate more faithfully a personal jurisdiction theory based on effective-litigation values. For example, he would abandon the significant connection jurisdictional standard and other provisions of the UCCJA that he believes rest on outdated notions of territoriality.[170]

The admirable work of such scholars has contributed greatly to our thinking on the question of judicial power to determine child custody. Nevertheless, their concerns derive, in part, from an application of due process/personal jurisdiction standards, as they have been developed in the context of suits seeking money or property, to the child custody context. Even Professor Ratner would apply a redefined, but generally governing, due process formulation to the custody context.[171] A flexible due process standard, however, is an unpredictable due process standard, one that will call into question the enforceability of custody decrees where the absent parent has little or no contact with the forum. As a result, such theories would reintroduce the uncertainty of personal jurisdiction law into the child custody domain, after the Commissioners on Uniform State Laws and Congress attempted to eradicate it through the promulgation of the UCCJA and the enactment of the PKPA. The minimum-contacts analysis, focusing as it does on the contacts of the absent parent with the forum state, could preclude the state with the most substantial contact with the child from entertaining a custody action. Thus, the application of a minimum-contacts theory in the child custody context would severely undercut the effectiveness of the UCCJA and the PKPA.[172]

B. *A Revised Understanding of Jurisdiction to Determine Child Custody*

The constitutional underpinnings of state court jurisdiction are, of course, found in the due process clause of the fourteenth amendment.[173] Although the Supreme Court at one time suggested that state sovereignty, as well as an individual's due process rights, were separate values protected through the personal

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170. *Id.* at 410-13.

171. *See supra* notes 168-70 and accompanying text.

172. One commentator, however, has defended the application of a minimum-contacts standard to child custody litigation, asserting that such a requirement would protect the rights of the opposing parent and would not compromise the interests of the child. *See* Sherman, *Child Custody Jurisdiction and the Parental Kidnapping Prevention Act—A Due Process Dilemma?*, 17 TULSA L.J. 713, 727 (1982).

173. The Supreme Court first articulated that the requirement of personal jurisdiction was a function of the due process clause in Pennoyer v. Neff, 95 U.S. 714, 733 (1877). Although the Court has abandoned much of *Pennoyer*'s construct in later cases, the fundamental linking of state court jurisdiction with due process has remained. *See, e.g.*, Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987). The Court's reliance on the due process clause to protect state sovereignty has provoked much scholarly criticism. *See, e.g.*, Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Pt. 2)*, 14 CREIGHTON L. REV. 735 (1981). For a recent defense of Justice Field's reliance on the fourteenth amendment as a bold federalization of individual rights, see Kogan, *infra* note 210, at 331-44.

jurisdiction doctrine,[174] the Court more recently has made clear that personal jurisdiction is an individual liberty interest, capable of waiver.[175]

Nevertheless, territoriality is still undeniably an element of the jurisdictional analysis. The minimum contacts doctrine, independent of fairness or reasonableness concerns,[176] ensures that the necessary territorial affiliation exists between the defendant and the forum state for the assertion of in personam jurisdiction.[177] Other geographic connections, however, have supported other kinds of judicial power. The presence of a trust corpus, for example, has been held to justify the exercise of judicial power to foreclose an absent beneficiary's opportunity to challenge the trustee's management of a trust.[178] The domicile of one spouse has been held to justify the exercise of power to dissolve the marriage relation of the other (absent) spouse.[179] Thus, territorial jurisdiction varies in its form, and the form determines the nature of constitutionally required territorial connections. To recognize that the child custody court's assertion of power affects the rights of the absent contestant does not lead ineluctably to the conclusion that the personal jurisdiction/minimum contacts construct must apply.

Justice Scalia's suggestion in *Burnham v. Superior Court* that judicial competence to determine child custody requires the assertion of personal jurisdiction over the absent parent may heighten interest in the problem addressed in this Article. Ironically, while the *Burnham* dicta revives the problem posed by *May v. Anderson*, the themes in the various *Burnham* opinions may provide a way out of the dilemma. In somewhat tautological reasoning, Scalia's plurality opinion held that due process rights were to be defined by reference to the rights protected by tradition. Justice Scalia wrote: "The short of the matter is that jurisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.' "[180]

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174. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-93 (1980) (concept of minimum contacts protects defendant against burden of inconvenient forum and also ensures "that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

175. In Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702-03 n.10 (1982), the Court explained that although personal jurisdiction doctrine operates to restrict state power, it "must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause." This revised explanation of the constitutional values at stake was reaffirmed in Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n.13 (1985).

176. *See, e.g.*, Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102, 108, 113 (1987) (discussing minimum contacts doctrine separately from the reasonableness factors).

177. *See generally* Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 SUP. CT. REV. 77; Stein, *Styles of Argument and Interstate Federalism in the Law of Personal Jurisdiction*, 65 TEX. L. REV. 689 (1987).

178. Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950).

179. Williams v. North Carolina, 317 U.S. 287 (1942). *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 71 (1971).

180. Burnham v. Superior Court, 110 S. Ct. 1205, 2115 (1990).

. In contrast to the Court's approach in *Shaffer v. Heitner*,[181] *World-Wide Volkswagen Corp. v. Woodson*,[182] *Asahi Metal Industry Co. v. Superior Court*,[183] and other modern personal-jurisdiction cases,[184] Scalia's plurality refused to engage in an independent inquiry into the fairness of the procedure under challenge. Instead, Scalia reasoned that "its validation is its pedigree, as the phrase '*traditional notions* of fair play and substantial justice' makes clear."[185] Responding to the argument that the Court should determine whether the doctrine of transient jurisdiction remains justified, Justice Scalia explained:

> Where . . . a jurisdictional principle is both firmly approved by tradition and still favored, it is impossible to imagine what standard we could appeal to for the judgment that it is "no longer justified. . . ." [A] doctrine of personal jurisdiction that dates back to the adoption of the Fourteenth Amendment and is still generally observed unquestionably meets [the standard of traditional notions of fair play and substantial justice].[186]

Thus, under the logic of the Scalia plurality, a traditional basis for establishing territorial jurisdiction, if still widely accepted, should survive a due process challenge without an independent inquiry into the fairness of the procedure. This reliance on "tradition-plus-modern-acceptance," plainly troublesome in other contexts,[187] may make sense in the judicial jurisdiction domain. In *Pennoyer v. Neff*, Justice Field announced for the first time that proceedings to enforce a judgment against a party over whom a court has no jurisdiction "do not constitute due process of law."[188] He explained that the terms "due process of law," while hard to define in many contexts, are relatively simple to define as applied to judicial proceedings. He wrote, "[t]hey then mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."[189] In light of Field's original reliance on "established rules and principles" in defining due process for purposes of judicial jurisdiction, Scalia's similar posture in 1990 seems defensible as a way of approaching jurisdictional practices.

On the other hand, Scalia's refusal to consider independently the fairness or reasonableness of the assertion of jurisdiction based on physical presence

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181. 433 U.S. 186 (1977).

182. 444 U.S. 286 (1980).

183. 480 U.S. 102 (1987).

184. *See, e.g.*, Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); Keeton v. Hustler Magazine, 465 U.S. 770 (1984).

185. *Burnham*, 110 S. Ct. at 2116.

186. *Id.* at 2116-17.

187. The Court previously has relied on tradition to define the scope of fundamental rights protected by substantive due process. *See* Bowers v. Hardwick, 478 U.S. 186 (1986); Michael H. v. Gerald D., 491 U.S. 110 (1989). This inflexibility has triggered impassioned criticism both on and off the bench. *See, e.g.*, Bowers v. Hardwick, 478 U.S. at 199-203 (Blackmun, J., dissenting); Michael H. v. Gerald D., 491 U.S. at 136-57 (Brennan, J., dissenting); Stoddard, Bowers v. Hardwick: *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 649 (1987); Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1, 15 n.60 (1989).

188. Pennoyer v. Neff, 95 U.S. 714, 733 (1877).

189. *Id.* For a discussion of the historical validity of Justice Field's view of the fourteenth amendment, see authorities cited *supra* note 173.

does conflict with the jurisprudence developed by the Supreme Court since *International Shoe Co. v. Washington.*[190] In *International Shoe* itself the Court established a baseline of "traditional notions of fair play and substantial justice"[191] against which to measure assertions of state court jurisdiction. That standard has evolved into a flexible inquiry into the reasonableness of particular jurisdictional practices, an inquiry not foreclosed by the practice's historical pedigree. Indeed, the Court on occasion has invalidated as fundamentally unfair certain assertions of judicial power based on procedures that were historically accepted. The rejection of Delaware's quasi-in-rem jurisdiction in *Shaffer v. Heitner*[192] is the salient example. Thus, it seems that Scalia's approach appropriately takes into account the jurisdictional doctrine's history and contemporary acceptance, but inappropriately excludes any consideration of fairness.

Other justices in *Burnham v. Superior Court* focused on the question of fairness in upholding the constitutionality of jurisdiction based on in-state service. Justice Brennan, joined by Justices Marshall, Blackmun, and O'Connor, wrote that "all rules of jurisdiction, even ancient ones, must satisfy contemporary notions of due process."[193] The "contemporary notions of due process" to which Brennan referred apparently include the factors the Court has identified in recent cases as defining the reasonableness of a particular exercise of jurisdiction.[194] The factors encompass the burden on the defendant, the forum's interest in adjudicating the dispute, the plaintiff's interest in obtaining effective relief, the interests of the interstate system in the most efficient resolution of controversies, and the shared interest of several states in furthering fundamental substantive social policies.[195]

The constitutionality of the exercise of territorial jurisdiction, then, should be analyzed with reference both to the historical and contemporary acceptance of a particular jurisdictional practice, and to the independent fairness or reasonableness of the practice. Both sorts of analysis, when applied to the child custody context, support the view that territorial jurisdiction exists in a state in which the child resides or is present. In enacting the UCCJA, state legislatures have required more connection than the constitutional minimum for policy reasons—to ensure that an interested forum with access to the relevant evidence hears the case. In enacting the PKPA, Congress approved of the UCCJA's basic formulation.

One can apply the logic of the Scalia plurality in *Burnham* to the child custody context in a straightforward manner. If state courts in the United States traditionally asserted the power to determine child custody on the basis of either the child's connection with the state or the absent parent's connection to the state, then the continuation of that practice today should not be vulnerable under the due process clause. As noted in Part I, the early common law

190. 326 U.S. 310 (1945).

191. *Id.* at 316.

192. 433 U.S. 186 (1977).

193. *Burnham*, 110 S. Ct. at 2120.

194. *Id.* at 2122 n.7.

195. *See, e.g.*, Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-77 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

regarding a court's competence to determine child custody jurisdiction focused on the child's connection with the forum state. That connection was, traditionally, the child's domicile.[196] The notion of exclusive jurisdiction in the state of domicile gradually gave way to an expanded jurisdictional view in the twentieth century that included the child's domicile or residence, the child's presence, or the existence of "personal jurisdiction" over both parents, as a sufficient basis for custody jurisdiction.[197]

The expanded common-law theories of jurisdiction were parsed and delimited in our current statutory approaches. Although the UCCJA and the PKPA abandoned the technical concept of domicile as a basis of jurisdiction, and also narrowed the significance of the child's presence, the jurisdictional standards of the two statutes remained focused on the child's connection to the forum state through the concepts of "home state" and "significant connection" jurisdiction. Except in cases of emergency or residual jurisdiction, the UCCJA and the PKPA operate to place custody jurisdiction in the states with substantial interest in the child's welfare.

The evolution of child custody jurisdiction reveals that the generally accepted theories of judicial competence, from nineteenth-century common law through contemporary statutory guidelines, have generally focused on the contact of the child with the forum state, and not on the ties of the defendant with the state.[198] With occasional aberrations, courts assumed that judicial power existed to determine custody once the requisite connection between the child and the forum state was established. Only when that connection was absent did the courts articulate a need for personal jurisdiction over the defending parent.[199]

Under Scalia's theory in *Burnham* of "tradition-plus-modern-acceptance," the child-centered jurisdictional standard, supported in history and in contemporary law, provides a constitutional basis for asserting power over the absent parent. Thus, I would posit that "territorial" jurisdiction is constitutionally required in the child custody context, because the child custody court must necessarily assert power over the person of the absent parent. Territorial jurisdiction for custody purposes, however, is not the equivalent of personal jurisdiction for purposes of asserting a monetary claim. Based on historical practice and current law, a child-centered standard for asserting territorial jurisdiction in the custody context (child's established home, child's significant connection, child's presence) is consistent with the due process clause. Stated conversely, no strong tradition in the common law requires personal jurisdiction over the absent parent before a court can determine child custody.

May v. Anderson can be read as requiring an assertion of power by the state through formal legislative processes. In other words, in order for a state to exercise territorial jurisdiction in the child custody context, it must have a long-

196. *See supra* notes 42-51 and accompanying text.

197. *See* Sampsell v. Superior Court, 32 Cal. 2d 763, 776-79, 197 P.2d 739, 748-50 (1948); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

198. *See supra* notes 42-54 and accompanying text.

199. *See* authorities cited *supra* notes 52-54.

arm statute that enables its courts to bind the absent parent to a decree. Significantly, the UCCJA not only guarantees the procedural due process rights of notice and opportunity to be heard but also addresses extraterritorial notice. Section 5 of the Act expressly requires notice to persons outside the forum state and prescribes the acceptable methods of notice and proof of service.[200] That explicit authorization could serve the function of a long-arm statute for purposes of binding the absent contestant.[201]

An assessment of fairness concerns, the second dimension of the constitutional equation, reveals that the current statutory approach to defining custody jurisdiction clearly serves the interests of the plaintiff, the forum state, and the interstate system. As explained in Part I, the Commissioners on Uniform State Laws attempted to achieve a jurisdictional structure that would enable the state most familiar with the child and her family to determine her custody. Congress, in turn, endorsed the basic philosophy of the Commissioners. In utilizing "home state" and "significant connection" jurisdiction, the Commissioners and Congress drafted definitions that would ensure the availability of evidence relevant to the child's welfare. Concomitantly, the Commissioners assumed that the state where such evidence is available would have, by virtue of its close connection with the child, an interest in adjudicating the child's custody and thereby protecting her welfare. The adoption of the UCCJA in every state and Congress' enactment of the PKPA show that the "interstate system" favors the basic jurisdictional formulation of the UCCJA and the PKPA.

The burden on the defendant remains an important factor in the Supreme Court's current doctrines of territorial jurisdiction. If, for example, a child and one parent establish a home in State X, a state that the other parent has never entered, is it "fair" for State X to determine the child's custody? In such a scenario, the absent parent, lacking all contact with the forum, might claim that his or her rights under the due process clause would be violated by the exercise of jurisdiction. Nevertheless, the tripolar nature of the custody dispute distinguishes it from the ordinary bipolar lawsuit, and the burdens on the defendant should not be allowed to eclipse the contacts of the child in assessing the fairness of jurisdiction.[202] Because the child's interest depends so heavily on the availability of a forum with access to relevant evidence, and because both custody contestants share an interest in the effective resolution of the matter, the mere lack of contacts by the absent parent with the forum state seems outweighed by other concerns.

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200. *See* UNIF. CHILD CUSTODY JURIS. ACT § 5, 9 U.L.A. 212-13 (1988).

201. Understandably, some state court cases have concluded that the UCCJA, as presently cast, does not authorize the assertion of personal jurisdiction and therefore does not support the assertion of judicial power to bind an absent parent. *See Ex parte* Dean, 447 So. 2d 733 (Ala. 1984) (neither UCCJA nor PKPA authorizes assertion of in personam jurisdiction over nonresidents). That conclusion derives from the Commissioners' position on the irrelevance of personal jurisdiction in the child custody context. *See supra* notes 145-51 and accompanying text. Moreover, Professor Bodenheimer explained that the Commissioners decided against the inclusion of a long-arm statute because of their doubts that any such statute could "stretch . . . far enough." Bodenheimer, *supra* note 141, at 1232-33.

202. Professor Bodenheimer made a similar argument based on the "tripartite" nature of custody disputes in support of her theory that a custody decree is an adjudication of status. Bodenheimer & Neely-Kvarme, *supra* note 16, at 233.

Moreover, even Justice Brennan in *Burnham v. Superior Court* argued that historical practice and contemporary acceptance are relevant to the fairness inquiry. In *Burnham*, he reasoned that "the fact that American courts have announced the rule for perhaps a century . . . provides a defendant voluntarily present in a particular State today 'clear notice that [he] is subject to suit' in the forum."[203] Similarly, the long-standing approach to child custody jurisdiction in this country focused first on domicile, and later on domicile or presence. The current statutory approaches to custody jurisdiction utilize a variation of the common law by adopting the concepts of home-state and significant-connection jurisdiction. Nevertheless, the child-centered measure of custody jurisdiction is consistent with the early approaches and should place parents or other custody contestants on notice that the state where the child resides or has significant contact is empowered to determine custody.

This revised understanding of the child custody/personal jurisdiction dilemma avoids the problems created by other approaches. Under the analysis presented here, the modern statutory formulations of child custody jurisdiction continue a tradition of jurisdiction based on child-centered contacts. Such formulations should survive constitutional challenge, both because of their historical pedigree and contemporary acceptance, and because of their consistency with the fairness concerns that are central to due process.

The theory I am advancing contemplates that the territorial jurisdiction asserted under the UCCJA would be a kind of "specific jurisdiction."[204] The state court power that arises under the UCCJA, based on child-centered contacts, is power specific to the custody of the child. Territorial jurisdiction for other purposes, such as the imposition of child support or alimony obligations, has traditionally required a different, defendant-centered justification.[205] On the other hand, if an absent parent is otherwise subject to personal jurisdiction in the "general jurisdiction" sense, then that basis of jurisdiction ought to suffice for the custody determination as well.[206] For instance, if both parents consent to the jurisdiction of a particular state, that state should be deemed empowered to determine child custody, even in the absence of the specified showings under Section 3 of the UCCJA.[207] It would seem that the UCCJA's policies of final-

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203. *Burnham*, 110 S. Ct. at 2124. Justice Scalia criticized Brennan's approach as "just tradition masquerading as 'fairness.'" *Id.* at 2114.

204. The contrasting terms of "specific jurisdiction" and "general jurisdiction" were developed 35 years ago to help courts more lucidly grapple with jurisdictional problems, *see* A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS 653-54 (1965), but the terminology was not adopted by the United States Supreme Court until relatively recent times. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 nn.8-9 (1984). *See generally* Twitchell, *The Myth of General Jurisdiction*, 101 HARV. L. REV. 610 (1988).

205. *See* Kulko v. Superior Court, 436 U.S. 84 (1978).

206. Although most state courts appear to view the UCCJA's prescribed bases of jurisdiction as exclusive, *see, e.g.*, Loper v. Superior Court, 126 Ariz. 14, 612 P.2d 65 (1980), at least one state seems to accept "status" jurisdiction and personal jurisdiction as *alternative* bases. *See* Creavin v. Moloney, 773 S.W.2d 698 (Tex. Ct. App. 1989).

207. The cases that endorse a subject matter jurisdictional characterization of child custody power have rejected consent as an adequate jurisdictional basis, *e.g.*, Mace v. Mace, 215 Neb. 640, 341 N.W.2d 307 (1983), and Professor Bodenheimer took a similar position. *See* Bodenheimer, *supra* note 141 at 1228. Professor Ratner has cogently argued that consent ought to be an alternative basis of power under the UCCJA. *See* Ratner, *supra* note 8, at 406-10.

ity, interstate cooperation, and advancement of the best interests of children are all served by an acceptance of consensual jurisdiction based on the voluntary participation of both parents. Similarly, no harm to the policies of the PKPA would occur if the Act were amended to require interstate recognition of decrees rendered after voluntary participation by both contestants.

The characterization of the jurisdictional standards under the UCCJA as "territorial" rather than "subject matter" would serve another purpose. The jurisdictional requirements, if not raised at the first opportunity by the opposing custody claimant, ought to be deemed waived. The nonwaivability of challenges to subject-matter jurisdiction has led courts to entertain belated objections to the competence of the child custody court.[208] Once a court has received evidence and made a custody determination after participation by both parents, a procedural rule that allows a disgruntled litigant to challenge the court's competence after the fact makes little sense. Such an approach, which invites the waste of judicial resources and tactical maneuvering in general,[209] is particularly troublesome in the child custody context. The rule of nonwaivability of jurisdictional objections leads to the very duplicative litigation that the UCCJA and PKPA were designed to prevent. A characterization of the jurisdictional standards under the UCCJA and the PKPA as elements of territorial jurisdiction would signal to the courts and to litigants that such jurisdictional objections must be raised at the outset.

III. CONCLUSION

Courts ought to recognize that power over the absent parent is a necessary element of judicial competence in child custody litigation. Judges should abandon the unfortunate habit of characterizing their competence in child custody cases as "subject-matter jurisdiction" and of declaring that personal jurisdiction is not required. Such formalism leads to unanalytic opinions and, frequently, to undesirable results.

The *Burnham v. Superior Court* case raises anew, albeit through Justice Scalia's misunderstanding of the jurisdictional issues before the Court, the problem of the due process rights of absent parents in child custody disputes. The *Burnham* case suggests that *May v. Anderson*'s dated perception of judicial authority in child custody cases still informs the thinking of at least some of the justices. I disagree with that thinking, to the extent it would require that an absent parent be subject to personal jurisdiction in the forum state before a court could constitutionally determine the custody of that parent's child. I have argued here that although judicial power over the absent parent is a constitutional necessity, such power, more aptly termed "territorial jurisdiction," can arise from child-centered contacts with the forum. Themes running through the *Burnham* opinions point a way to accommodate the constitutional interests at stake without undermining the advances of the UCCJA and the PKPA.

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208. *See supra* notes 31-36 and accompanying text.

209. *See* Dobbs, *Beyond Bootstrap: Foreclosing the Issue of Subject-Matter Jurisdiction Before Final Judgment*, 51 MINN. L. REV. 491 (1967).

Justice Scalia, writing for a plurality, reasoned that traditional approaches to personal jurisdiction, if they are reflected in widely accepted modern practice, provide all the process that is due under the fourteenth amendment. In the child custody context, courts have traditionally exercised authority over the custody contestants on the basis of the child's connection to the forum. That child-centered approach to judicial competence is continued today in the carefully drawn rules of the UCCJA and the PKPA. The nonresident parent is on notice that the state where the child resides or has significant contact may assert power to determine the child's custody. Such power, or territorial jurisdiction, binds the absent parent within the forum state and, under the PKPA, outside the state.[210]

While the theory advanced in this Article validates the basic approach of the UCCJA and the PKPA, it does invite changes in the jurisdictional thinking of many courts. In particular, the theory urged here would accept consent, as well as other bases of "general personal jurisdiction,"[211] as an alternative basis of jurisdiction in custody disputes. Moreover, the theory would preclude belated challenges to the territorial jurisdiction of the custody court.

Jurisdictional uncertainty, and the litigation it produces, waste time and resources for all participants in the judicial system. In the child custody context, jurisdictional ambiguity leads as well to conflicting custody determinations and instability in the personal lives of the litigants and children. In that area, perhaps more than in others, our judicial system owes to the participants a framework of clear jurisdictional lines and predictable outcomes.[212]

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210. The recognition in constitutional theory of the relevance of a national consensus on child custody jurisdiction may comport with the "neo-federalist" view of personal jurisdiction. *See* Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S CAL. L. REV. 257 (1990) (arguing that changes in personal jurisdiction doctrine from before *Pennoyer* through *International Shoe* reflect changes in our constitutional identity as a federal nation).

211. Justice Scalia apparently would hold that service of process on a defendant in the forum state is sufficient to support judicial power to determine the custody of the defendant's children. *See Burnham*, 110 S. Ct. at 2109. If such a case were to arise in a forum that had virtually no connection to the child or the contestants, one would hope that a court would favorably receive a forum non conveniens motion.

212. I have made this point in another context. *See* Atwood, *Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity*, 36 UCLA L. REV. 1051 (1989).